Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

MOFFETT, HOUGHTON & CLARKE COMPANY,
Petitioner,

against

THE CITY OF ROCHESTER AND OTHERS, ETC.,

Petitioner's Brief and Opinions of Judges Case, Wallace and Shipman.

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C. G. Hasbrouck Printing and Paper Works, N. Y.

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MOFFETT, HODGKINS & CLARKE COMPANY,
Petitioner,

AGAINST

The CITY OF ROCHESTER; GEORGE W. ALDRIDGE, WILLIAM W. BARNARD and JOHN U. SCHROTH, composing the Executive Board of the City of Rochester,
Respondents.

On Petition for Certiorari.

PETITIONER'S POINTS.

The complainant has filed a petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit, for the purpose of procuring a review and determination by this Court of a number of questions of gravity and importance which are involved in this suit, and which, together with the facts out of which they arise, are stated with sufficient fullness in the petition for a writ of *certiorari*, which is herewith submitted.

In addition to the facts thus presented, it is deemed proper to enter upon a consideration of the principles of equity jurisprudence, the existence of which is recognized by the United States Circuit Court and is disputed by the United States Circuit Court of Appeals in the Second Circuit.

In brief, one court holds that a court of chancery may exercise the power of cancellation and rescission on the ground of unilateral mistake, while the other practically denies such power, even though the mistake is conceded, is substantial in character, and is sought to be made the means of profit by the other party.

This proposition, in its various phases, as presented by the record on which this cause was heard, will be discussed to such an extent only as to indicate that it is one which should be reviewed by this Court.

POINTS.

I.

This cause is still pending in the United States Circuit Court of Appeals for the Second Circuit; the mandate on its decision not having as yet been issued, and the transcript of the record in the Circuit Court being still with the Clerk of the United States Circuit Court of Appeals. The power of this Court to issue a writ of certiorari therefore exists.

Forsyth vs. Hammond, 166 U. S., 506.

II.

The questions involved in this cause are of sufficient gravity and importance to merit the consideration of this Court.

since the existence of important principles of equity jurisprudence is at stake as to which there is a difference between the United States Circuit Court and the United States Circuit Court of Appeals, and between the latter and various other American and English Courts.

A case is presented which justifies the granting of the writ as fully as did the cases of

Lau Ow Bew, petitioner, 141 U. S., 583, 587;
Forsyth vs. Hammond, 166 U. S., 506;
Dickerman vs. Northern Trust Co., 168 U. S., 711,

and the various other cases reported in memorandum in

167 U. S., 746.
168 U. S., 708, 712.
169 U. S., 736.
170 U. S., 704 to 707.

III.

A court of equity has the power to relieve a party against the consequences of a clerical error by the remedy of cancellation and rescission, although such error was unilateral, and fraud cannot be predicated of any act of the other party.

Judge Coxe recognized, as a principle of equity, that:

"Cancellation is proper where there is an apparently valid written agreement or transaction embodied in writing, while in fact by reason of a mistake by both or one of the parties, either no agreement at all has really been made, since the minds of both parties have failed to meet upon the same matters; or else the

agreement or transaction is different, with respect to its subject matter or terms, from that which was intended."

Judge WALLACE, on the other hand, referring to this ruling, says :

"The Court below adopted the opinion which has been sometimes expressed *obiter* by judges, and frequently quoted by text writers, that equity will not reform a written contract unless for the mistake of both parties, but may rescind and cancel one upon the ground of a misiake by either.

* * * * * *

"A very extended examination of the reports has failed to disclose a case in which a judgment rescinding a contract has proceeded solely upon the ground that the terms as reduced to writing, although expressing the understanding of one party, did not express that of the other. In all the reported cases where there was not the element of mutual mistake, or mistake of one side with knowledge on the other, there was, in the language of Addison, 'some undue influence, misrepresentation, surprise or abuse of confidence,' or the contract was so oppressive as to be unconscionable."

These quotations present in contrasted form the variances between the two courts which have thus far passed upon this case.

It will prove useful to call attention to a number of authorities which support the proposition as declared by the Circuit Court, and which, it is believed, have either been overlooked or misconceived by the United States Circuit Court of Appeals.

The rule as announced by Judge COXE was formulated by *Prof. Pomeroy*, in *Volume 2, Sec. 870*, of his most excellent work on *Equity Jurisprudence*, and as the result of a thorough and scholarly analysis of numerous decisions, both of the English and American courts.

He recognizes that there is a manifest distinction between a mistake calling for cancellation, and one calling for reformation.

It is clear that where one party only has made a mistake, and the other has been guilty of no fraud and has not contributed to the mistake, or was not cognizant of it, reformation is inappropriate. To reform an instrument under these circumstances, so as to change its provisions, is to make a contract for the parties which they did not themselves make and which one of them never intended to make. In other words, by reforming an instrument in such a case, the Court would attempt to create a meeting of the minds which never took place.

On the other hand, however, where one of the parties does not intend to enter into a contract or written transaction in the form embodied in the written instrument, or by reason of a clerical error or other mistake, his pen declares what his mind did not intend, there has been no meeting of the minds however innocent the other party to the instrument may be of fraud, mistake, undue influence or abuse of confidence.

In such a case it would be manifestly unjust to hold a party to an agreement which he never in fact made, and to declare his written word irrevocably binding however injurious the consequences, and however remote from his real purpose and intention.

Unless this were so, most astounding and ruinous consequences might result from clerical errors or innocent mistakes, which are of common occurrence in the experience of every business man.

Thus, if A should offer to sell property worth $10,000 to B for $1,000, when he really intended to offer it at $10,000, and B, in ignorance of A's true intention, should accept the proposition, under the rule announced by the United States Circuit Court of Appeals A would have no remedy.

Or, if A, intending to sell Blackacre for $10,000, should, by mistake, offer Whiteacre, which is worth $15,000, and B should, without fraud, accept the proposition, according to the same view, no relief could be had.

Or, taking the present case for illustration: It is

conceded that the petitioner intended to bid 70 cents per cubic yard for earth excavation. By a mistake, which was purely clerical, 50 cents only were charged in the written proposal, but before the acceptance of it, and instantly upon discovering the mistake, it was sought to be rectified. Under the decision of the Circuit Court of Appeals, the petitioner is held irrevocably bound by this bid, although, concededly, it did not express what was intended.

If the rule laid down by the Circuit Court of Appeals is sound, then the same result would have followed if, instead of bidding 50 cents, the petitioner had offered to do the work for ten cents per cubic yard.

There is something so shocking to one's sense of justice in a system of jurisprudence which would tolerate such consequences that a mere generalization as to what has or has not been decided in adjudged cases is not sufficient to convince the mind of the existence of such a doctrine; but a more careful examination of the authorities is essential.

In *15 Am. and Eng. Encyl. of Law, title* "Mistake" *page 647*, the doctrine for which we contend is formulated in the following language:

"Equity will not *reform* a written instrument unless the mistake is proven to be the mistake of both parties, but may *rescind and cancel* a contract upon the ground of mistake of facts material to the contract of one party only."

In *Adams' Equity* the doctrine is thus expressed:

"A mistake on one side may be a ground for rescinding a contract or for refusing to enforce its specific performance, but it would not be a ground for altering its terms."

In *Rider vs. Powell, 28 N. Y., 310*, the action was one for the reformation of a mortgage. The majority of the Court of Appeals affirmed a decision permitting such reformation. Some of the Judges dissented because there was no proof of a mistake or fraud on the part of the defendant, although there was proof of a

mistake on the part of the plaintiff. Yet, in their dissenting opinion, they recognized the principle for which we contend, Judge WRIGHT saying :

" I suppose the rule to be that when there is a mistake on one side, and that a material mistake, it may be a ground for rescinding a contract or for refusing to enforce its specific performance, but not a ground for altering its terms. A mistake by the plaintiff when he made the contract, as to the interest he was to receive on the bond and mortgage, would not entitle him to have the contract so modified as to conform to his mistaken impression, although it might be a reason for rescinding the contract on the ground that the minds of the parties never met in making it."

Again he says :

" This distinction has been sometimes overlooked in the application of the general rule, and some confusion and uncertainty thereby created, but it stands upon sound reason, and is inherent in the very nature of the different remedies. As there is no doubt as to the plaintiff's mistake and the mistake of his attorney, nor that it was most material, the plaintiff is entitled to the relief granted on that ground alone."

In *Smith vs. Mackin, 4 Lansing, 41*, Mr. Justice JOHNSON treats of the proposition with great clearness as follows :

" It is one of the cardinal rules of equity that an act done or a contract made under a mistake, or in ignorance of a material fact, is voidable and relievable in equity *(Story's Equity, Sec. 140)*. That the mistake here was in regard to a most material fact cannot be denied. The defendant knew how the fact was at the time the contract was made, and was also aware of the plaintiff's misapprehension in regard to it. It is claimed that, inasmuch as there was no mistake on the part of the defendant, the plaintiff cannot have relief on that ground ; that, to entitle a party to relief on that ground, the mistake must be mutual. In cases where the relief sought was the reformation of the contract, it has been held, and the general rule undoubtedly is, that, to entitle a party to that species of relief, the mistake must be mutual. And there is good reason for this. The object of a reformation is to make

the terms of the contract express what the parties intended it should express; in other words, to express the minds of the parties as they met upon the subject matter. If the minds of the parties did not meet, and one understood the matter as expressed in the agreement, and the other differently, there can be no reformation, in the nature of things, because nothing was agreed upon in the minds of the parties. Their minds never met; and the court, instead of reforming a contract, would make a new one altogether, which both parties never intended to make, should it attempt to alter and reform in such a case.

"But I understand the rule to be quite different when the relief sought is the rescission of the contract altogether. This goes upon the ground of relieving any party who has become bound by a contract which he never intended to make, and never would have made, but for a mistake he was laboring under in regard to a material fact. The rule is thus laid down in *Adams' Equity, 171*: 'A mistake on one side may be a ground for rescinding a contract, or for refusing to enforce its specific performance; but it cannot be a ground for altering its terms.' This is recognized as the true rule by WRIGHT, J., in his dissenting opinion in *Rider vs. Powell (28 N. Y., 310, 316)*. This distinction has been sometimes overlooked by courts in the application of the general rule, and some confusion and uncertainty thereby created. But it stands upon sound reason, and is inherent in the very nature of the different remedies. As there is no manner of doubt as to the plaintiff's mistake and the mistake of his attorney, nor that it was most material, the plaintiff is entitled to the relief granted on that ground alone."

In *Jackson vs. Andrews, 59 N. Y., 244*, Judge GROVER said:

"To entitle the plaintiff to a reformation of the contract he must prove that it was the intention of both parties to make a contract such as he sought to have established; and that this intention was frustrated either from some fraud, accident or the mutual mistake of the parties. It was not enough for him to show his own intention. He must further show that the sense and intention of the defendant concurred therein. He must prove that both parties understood the contract as he alleges it ought to have been, and, in fact, would have been but for the fraud or mistake.

* * * * * *

"Had it appeared that there was a mutual misunderstanding of the parties in these respects—that, in fact, they had never agreed upon its terms—and the plaintiff had sought to have it canceled upon this ground, and to be restored to his former rights, the question would have been different. But no such relief was sought or asked for by the plaintiff in the action."

In *Crowe vs. Lewin, 95 N. Y., 423* (see, also, *Erratum, 96 N. Y.*), Judge FINCH said:

"On the ground of their mistake, the defendants, who stood liable on the covenants of their deed, asked to reform that instrument by substituting in it the Bronx River lots. But that relief would impose a new contract on plaintiff which he never made, and to which he is not bound to accede. The action of equity in reforming a contract is to make it speak for the minds of the parties, but here the defendants' effort is to make it speak the mind of one but not of the other. The mistake should be corrected, but it can only be done by a rescission of the formal contract, and a restoration to each of what has been parted with on its faith."

In *Dulany vs. Rogers, 50 Md., 533*, it is said:

"A mistake on one side may be ground for *rescinding*, but not for *reforming*, a written agreement."

In *Dimon vs. Providence, W. & B. R. Co., 5 R. I., 130*, Chief-Justice AMES said:

"A court of equity has no power to alter or reform an agreement made between parties, since this would be in truth a power to contract for them; but merely to correct the writing executed as evidence of the agreement, so as to make it express what the parties actually agreed to. It follows that the mistake which it may correct in such writing must be, as it is usually expressed, the mistake of *both* parties to it; that is, such a mistake in the drafting of the writing as makes it convey the intent or meaning of neither party to the contract."

The opinion, however, recognizes the fact that while equity will not reform a written contract unless the

mistake is proved to be the mistake of both parties, it may rescind and cancel a contract upon the ground of a mistake of facts material to the contract by one party only.

In *Griswold vs. Hazard, 141 U. S., 260*, the plaintiff executed a bond in *ne exeat* proceedings against one Durant, conditioned that the latter should "abide and perform the orders and decrees" of the Court. The bond was executed by the plaintiff upon the understanding that the obligation in law assumed by him by its execution, was to subject him to liability for the penal sum named, only in the event that the principal failed to appear and become subject to the order and decrees of the Court.

Durant having died, a decree was rendered perpetually enjoining any action, suit or proceeding to make the plaintiff liable in any sum whatever, by reason of the execution of the bond on the mistake of Griswold alone.

In *Hearne vs. Marine Insurance Company, 20 Wall., 488, 490*, Mr. Justice SWAYNE, speaking for a unanimous Court, said:

"The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred.

"The party alleging the mistake must show exactly in what it consists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. The mistake must be mutual and common to both parties to the instrument. *It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met there is no contract, and, hence, none to be rectified.*"

In support of the proposition that a unilateral mistake may be ground for rescission, Mr. Justice SWAYNE cited *Mortimer vs. Shortall, 2 Drury & Warren, 372.*

This authority is attacked by Judge WALLACE, in his opinion in this case, as being neither lucid nor logical, but it is believed that a mere phrase is insufficient to obliterate and overrule authorities of the importance of those which have been cited, in which the principle for which we contend is recognized as an existing principle.

It is apparent, from each of these authorities, that the real ground for recognizing the right of cancellation and rescission in the case of unilateral mistake was that the fundamental test of a contract was not present, viz., a meeting of the minds of the parties, or, as it is expressed in Anson on Contracts, Sections 122 to 136, an " identity of ideation."

Hence, a court of equity which is not limited to mere forms of expression, but which regards the true intent of litigants, has, for the purpose of preventing injustice, undertaken to undo that which was induced by the mistake of one of the parties, to the end that no advantage may be taken by the other of such mistake.

In his opinion Judge WALLACE seeks to distinguish a number of the cases to which we have referred by the suggestion that each of them involved a mistake by one of the contracting parties, and unconsionable conduct on the part of the other. An examination of the cases, however, discloses the fact that in the rendition of their judgment, so far as they recognize the existence of the principle which we are invoking, the courts did not lay stress on the circumstances to which Judge WALLACE referred.

Thus, in *Smith vs. Mackin (supra)*, the Court planted its decision upon two independent grounds, the first of which was that there was a mistake on the part of the plaintiff and none on the part of the defendant, and that, nevertheless, equity would grant relief in the form of a cancellation of the alleged contract. As an additional reason for the decision

rendered the Court adverted to circumstances which would have supported the contention that the conduct of the defendants, in seeking to take advantage of the plaintiff's error, was inequitable.

So, in *Rider vs. Powell (28 N. Y., 310)*, the Judges who asserted the right of rescission gave no weight to any facts indicating that the defendant acted unconscionably. As a matter of fact, the Court below had found that there was no proof of mistake or fraud on the part of the defendant.

The criticism of *Jackson vs. Andrews, 59 N. Y., 244*, does not meet the proposition for which we have cited that authority.

The only relief sought was reformation, and that was denied because it was not shown that there was mutual mistake. It was not enough for the plaintiff to show that he never agreed to the terms of the contract, in order to entitle him to a reformation. The Court clearly decided, however, that upon those facts he would have been entitled to a cancellation of the contract, had he sought that species of relief.

The decision in *Griswold vs. Hazard, 141 U. S., 260*, is also sought to be distinguished on the theory that there was fraud on the part of the defendant.

Yet the real ground of the decision is indicated by the language of Mr. Justice HARLAN, on page 284, where he says:

"While it is laid down that 'a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts,' yet 'the rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of courts of equity, resting on discretion and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best-considered and best-reasoned cases upon this point, both English and American.'"

That the Court rested its decision upon this proposition solely is indicated by the language on page 286, where Mr. Justice HARLAN says:

"But we do not rest our decision upon any ground of fraud in law or fraud in fact. We acquit the attorneys of Hazard of any desire or purpose to do injustice to Griswold, or to commit a fraud upon him."

While thus combating the cases which we have cited in support of our proposition, the learned Court does not cite a single case which attacks the soundness of that proposition, or which declares that a unilateral mistake clearly established and material in its character, does not afford ample ground for equitable intervention.

But, even taking the view of Judge WALLACE that, in addition to proving the existence of a mistake by one party, it is necessary to establish fraud or unconscionable conduct by the other in order to procure a rescission or cancellation, the record fully discloses such conduct on the part of the defendants as would bring this case within the qualified rule suggested by the Court.

The conceded facts are that, in making its proposal for the construction of Route B, designated in Contract No. 2, Burlingame, the petitioner's engineer, made several errors aggregating $63,800. One of these errors, at least, was a clerical error, and consisted in erroneously charging 50 cents per yard of earth excavation instead of 70 cents per yard, as intended.

These errors were real, and not the result of an afterthought. They were unintentional. They are substantial and material. There could have been no possible motive which would have induced the petitioner to make the bid which it did. It intended to do one thing but proposed to do another.

This is demonstrated by the fact that, instantly upon the reading of the bid, Burlingame called attention to the clerical error with respect to the earth excavation. This is conceded, and this concession disposes of any possible question which might arise as to the sufficiency of the proof establishing the occurrence of a clerical error.

Notwithstanding the fact that the defendants were at once informed of the mistake before any action was taken by them, before the bids were read, before they in any way altered their position; notwithstanding the fact that before any attempt was made by the defendants to accept the proposal, the petitioner sought to be relieved from the consequences of the mistake and asked for leave to withdraw its proposal, the defendants, with full knowledge of the mistake, and of the petitioner's attempt to correct it, refused to allow a withdrawal of the bid and insisted upon taking advantage of the errors thus committed.

A comparison of the petitioner's bid with those of the other bidders for the work, and a consideration of the discrepancies between the petitioner's bid and the others that were made, is in itself a demonstration that the determined effort of the defendants to take the benefit of the petitioner's mistake is an attempt on their part to take such an undue advantage of this unintentional blunder as to constitute unconscionable conduct.

This is emphasized by the fact that although the petitioner's mistakes all related to Route B, and did not occur in its bid for Route A, yet the defendants undertook to award the contract to the petitioner on Route B, where the aggregate bid was $857,552.50, and disregarded Route A, as to which the petitioner's bid was $903,324. Within a month thereafter, and while the defendants were under an injunction restraining them from defaulting the petitioner, they awarded the contract on Route A to Whitmore, Rauber & Vicinus at the sum of $1,123,920, although the bid of that firm on Route B was only $1,130,195. In other words, it was evidently the studied purpose of the defendants to force the petitioner into a contract on Route B, with full knowledge of its mistake; to impose upon it a forfeiture of $90,000 in the event of its failure to enter into such a contract; to pass over its bid on Route A of $903,324 and to award the contract to residents of the City of Rochester at a sum $220,000 in excess of the

bid made by the petitioner, in which no errors occurred ; evidently seeking to justify their course to the community by making reprisals on the bond given by a foreign corporation.

If Judge WALLACE correctly characterized the conduct of the defendants in the cases which he seeks to distinguish as unconscionable, what is to be said of this action?

It must not for a moment be conceived that any doubt exists as to the facts which have been here recited and as to the defendants' practical concession of them.

In his opinion, Judge COXE says :

" Upon the principal issue there is no disputed question of fact. Counsel for the defendants, though not admitting the mistakes which are the basis of the action, do not dispute them. The oral argument proceeded upon the theory that the mistakes were made precisely as alleged. In order that no injustice may be done to the defendants, their position in this regard is stated in the language of their brief as follows : ' We admit that the evidence of the complainant shows that Mr. Burlingame entered in his proposal sheets certain figures or prices different from those which he intended to make and that the defendants have no evidence to contradict his testimony.' "

Judge WALLACE said :

" The evidence satisfactorily proves that the complainant made a clerical error in inserting in the proposal for contract No. 2, Route ' B,' the price of fifty cents instead of seventy cents per cubic yard for certain earth excavations (of the estimated quantity of 184,000 cubic yards), whereby the total amount of the bid, when the various items were tabulated, was $36,800 lower than it would otherwise have been. The evidence also indicates that the complainant made an erroneous estimate of the cost of certain tunnel excavation by omitting to take into consideration certain features of the work, and in consequence inserted in that proposal the price of one dollar and fifty cents per cubic yard, whereas it would have otherwise inserted a price of fifteen dollars. * * * At the time of the public reading of the bids the com-

plainant called the attention of the board to the mistake in the price for the earth excavation, but did not mention the other alleged error."

Judge SHIPMAN says:

"The complainant, it is right to assume, honestly blundered in supposing that the contracts were to be let for the entire work, which was the result at which it was aiming, both in its proposals and in its subsequent proposition. It made three kinds of mistakes. It supposed, or acted as if it supposed, that both proposals must be considered together, and be accepted or be rejected; it made one clerical error in one proposal and also an error through haste in filling out the estimates."

Rarely has a case involving the doctrine of mistake been presented to a Court where there has been less doubt as to the existence of the fundamental fact than the present. Rarely has a case been presented in which there was a more immediate attempt to retrieve the error than the present. It is likewise believed that rarely has it occurred that a party, whose attention has been called to the existence of the error, has been more persistent in an attempt to take advantage of the mistake, and to derive profit from another's misfortune, than have the defendants in this case.

The language of Mr. Justice NELSON, in *Bradford vs. Union Bank, 13 How., 68*, is most appropriate here:

"We are satisfied, therefore, that the case falls within the established principles of equity, in granting relief against contracts entered into by mistake, and misapprehension of the facts, and where the enforcement of which would enable one of the parties to obtain a most unconscientious advantage over the other."

The scarcity of cases involving similar features to the present is principally due to the fact that, but for the provision of Section 172 of the Charter of the City of Rochester (Laws of 1890, Chapter 561, p. 1027), cited in the opinion of Judge WALLACE, which is to the effect that

"Neither the principal, nor the sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made and the same shall have been duly executed,"

this case would never have arisen.

It is well settled at common law that until the moment of acceptance an offer is revocable.

Schenectady Stove Co. vs. Holbrook, 101 N. Y., 45.
Cook vs. Oxley, 3 Term Rep., 653.
Dickinson vs. Dodds, L. R., 2 Ch. Div., 463.

Judge WALLACE concedes that this provision does not preclude a court of equity from granting relief in a proper case. It is only because the power of withdrawal did not exist that the petitioner must come into court to relieve itself against threatened forfeiture and for a rescission or reformation of its bid. This the statute does not prohibit. It does not assume to restrict the powers of a court of equity. The equitable jurisdiction to relieve a party from the consequences of accident, mistake or fraud, is not taken away. An effort in that direction would have been unavailing, because violative of the Constitution of the State of New York.

De Hart vs. Hatch, 3 Hun, 375.
People ex rel. Mayor vs. Nichols, 79 N. Y., 590.

The only purpose of the statute was to prevent parties, by their own act, from withdrawing a bid once made and thereby occasioning confusion and injury to the municipality, and facilitating sharp practice and jobbery. But nothing could have been more foreign to the purpose of the Legislature than a prohibition of the Courts, acting judicially, from nullifying a bid. Otherwise, the petitioner would have been bound by a bid made by Burlingame under duress, or while insane, or under fraudulent inducements given or false representations made by the defendant's repre-

sentatives, or upon substituted specifications. Such a position would be violative of every conception of justice and equity.

There are, however, at least four well-considered cases in which Courts have declared that no contract was entered into in fact, although all the forms of a contract existed, simply because the minds of the parties had not met.

Thus in *Webster vs. Cecil*, 30 Beavan, 62, where the defendant sent a written offer to sell property and wrote L. 1250 for L. 2250, by a mistake in a hurried addition of items computed on a separate piece of paper. On receiving the plaintiff's acceptance, he discovered the mistake, and at once gave notice of it. The plaintiff had reason to know the real value of the property. Under these circumstances specific performance was refused, on the ground expressed in a subsequent case, that the plaintiff "snapped at an offer which he must have well known to be made by a mistake."

See, also,

1 Story Ex. Jur., § 7491.
Pollock on Contracts, § 427, Ch. Mistake.
Latham vs. James, L. R., 13 Eq.
Harris vs. Pepperell, L. R., 5 Eq., 1.
Garrard vs. Frankel, 30 Beav., 445.
Bloomer vs. Spittle, L. R., 13 Eq., 427.

In *Hartford & New Haven Railroad Company vs. Jackson*, 24 Conn., 514, the defendants applied to the plaintiff's agent to transport 50,000 laths from Middletown to Hartford and inquired the expense of transportation. The latter having asked how many bundles that quantity would make, a companion of the defendants, to whom they referred the inquiry, replied 500. The agent understood him to say 100, and he thereupon gave the defendant the price of transporting 100 bundles as the price for the transportation of 500 bundles, which price the defendants agreed to pay.

It was held that the misunderstanding of the agent in regard to the quantity of laths prevented

that meeting of the minds of the parties which was essential to a contract between them.

Mr. Justice STORRS said :

" The misunderstanding by the plaintiffs of the offer which was made by the defendants in regard to the quantity of laths which the latter proposed to have transported and which was in form assented to by the former, prevented that meeting of the minds of the parties, that *aggregatio mentium* which was essential in order to constitute a contract between them, and such assent no more bound the plaintiffs than if the offer had been made by the defendants in a language which the plaintiffs did not understand, through an interpreter who had falsely translated its terms."

" In order to such a contract it is necessary that the parties assent to it, and it is well expressed by Mr. Parsons in his Treatise on Contracts that they must assent to the same thing in the same sense. The proposition of one party must be met by an acceptance of the other, each corresponds with each, which cannot be the case when the proposition is misunderstood by the party to whom it is made."

In *Rowland vs. N. Y. & New Haven R. R. Co.*, 61 Conn., 103, the plaintiff asked the defendant's freight cashier at his office at Waterbury what the freight rate was from there to Branford. The cashier, who did not know, and whose duty did not require him to know, asked the way-bill clerk in the same office, but the clerk, by reason of the noise of a passing train, failed to hear the question correctly, and understood him to ask the rate to Milford, a place not so distant, and gave the rate at 13 cents per hundredweight instead of 21 cents, the correct rate to Branford. The cashier then figured up the amount and stated to the plaintiff that it would be $9.75, which the plaintiff paid and delivered the goods to the railroad company for transportation. The regular rate was $15.75. After the plaintiff left, the clerk discovered his mistake and endeavored to find him, but he had left town, and not knowing how to communicate with him, he sent on the goods to Branford, with instructions to collect the additional six dollars. The mistake was fully explained to the plaintiff there, but he refused to pay, and, the goods

being withheld from him, brought an action for their recovery.

It was held that, regarding the clerk as representing the company in the transaction, the minds of the parties, by reason of the mistake made, did not meet upon the question of the freight rate to be charged, and that therefore there was no contract.

Mr Justice TORRANCE said:

"On the assumed state of facts we think the minds of the parties never met on account of this fundamental error or mistake, the result being that the contract attempted to be made was not in fact made. In this view of the matter, the case comes clearly within the principles laid down in Hartford & New Haven Railroad Company vs. Jackson, 24 Conn., 514, and must be governed thereby."

In *Rupley vs. Daggett*, 74 Ills., 351, it was held that where there is a mutual mistake in regard to the price of an article of property there is no sale and neither party is bound. There has been no meeting of the minds of the contracting parties, hence there can be no sale.

There, the owner of a mare asked $165 for her. The purchaser understood the price asked to be $65 and took her home with him, and refused to pay more than the latter-named sum. The transaction was declared not to constitute a sale.

See, also,

Cundy vs. Lindsay, L. R., 3 Appeal Cases, 465.
McCotter vs. City of New York, 37 N. Y., 324.
Saltus vs. Pruyn, 18 How. Pr., 512.
Kyle vs. Kavanagh, 103 Mass., 356.
Goodrich vs. Lathrop, 94 Cal., 56.

Judge WALLACE seeks to distinguish the case of Weber vs. Cecil *(supra)*, by saying:

"The case was one where the vendee knew when he transmitted his acceptance that the proposal did not express the intention of the vendor."

But was it not true here that when the defendants awarded the contract to the petitioner they knew as well as any fact could possibly be known that the proposal, which was accepted did not express the petitioner's intention?

The Connecticut cases are dismissed with the suggestion that they are actions at law, where the question was whether a railroad company was entitled to charge its ordinary freight rates for carrying after there had been a preceding negotiation in which the minds of the parties had not met in respect to a different rate.

As a matter of fact, there were not only negotiations, but actual agreements which were acted upon by the party to whom the proposal was made, and who accepted it.

In form, the contract was as complete as though it had been reduced to writing. In fact, it was held that no contract was made, because there was not that *aggregatio mentium* which was a prerequisite of a contract.

These cases are therefore deemed to be directly in point upon the proposition that the existence of a mistake which prevents the meeting of the minds, although unilateral, affords a ground for the cancellation and rescission of the contract which has been apparently perfected.

The Court lays stress upon the circumstance that before any action was taken by the defendants, the petitioner sent a communication to the board insisting that its bid for the whole work in contracts number 1 and 2 was a single proposal, protesting against letting the two contracts to different contractors, and stating that clerical errors had been made in the proposal for Contract No. 2, Route B, in the prices for earth excavation and tunnel excavation, and the details of the errors. That communication concluded as follows:

"We therefore respectfully request either that the contract in its entirety for both sections of the work

be awarded to us, at the corrected prices, or that we may be allowed to withdraw our proposal."

Judge SHIPMAN admits that the petitioner honestly blundered in supposing that the contracts were to be let for the entire work.

The evidence indicates that this belief was entertained. The fact that the bids for both contracts were presented in a single package under one cover, that the defendants at first declined to entertain the bids on account of their irregularity, and that the two pieces of work were interdependent, shows that the petitioner acted in good faith.

The mere request that the contract in its entirety for both sections of the work should be awarded at the correct prices does not deprive the petitioner of its standing in court, or justify a court in overlooking its request that it might be allowed to withdraw its proposal, or justify the defendants in awarding a contract not for Route A, where no errors existed, but for Route B, where the existence of such errors was demonstrated.

It is no answer for the defendants, when called upon to act fairly, and to relieve the petitioner from the consequences of an unfortunate mistake, to say that the petitioner asked for greater relief than that to which it was entitled.

If an excessive prayer for relief justifies the withholding of every remedy, then there are but few cases in which a court of chancery will ever be able to grant relief.

The defendants proceeded on the theory that public policy forbids the Court from rescinding a bid on public work. In fact, in the Circuit Court, they admitted that a different rule exists as to competitive proposals on public work from that which applies in the case of private individuals, and that there is something so sacred about a public contract that the Courts must keep aloof from it.

This is but another way of saying that the principles of honest and fair dealing which the State ap-

plies to its subjects are not applicable to the State itself; that while individuals may not speculate on the mistakes of their neighbors, or take an unconscionable advantage of accident or error, the sovereign, and those in whom governmental functions are lodged, while acting in the private capacity of a contractor, may, nay, must, insist upon confiscation and forfeiture, and treat even a conceded mistake as irremediable.

When has public as well as private honesty ceased to be the true public policy? Why should a municipality, when it becomes a contracting party, be governed by any different rules than the party with whom it contracts? The distinction which the defendants seek to make is entirely fanciful, unreasonable and unsound.

It is conceded that in order to justify a court in interfering in the case of a public contract, as in every other case, the evidence of the existence of the mistake must be clear and conclusive, and that the court must carefully scrutinize the testimony in order to protect itself from imposition.

But here, there is no room for doubt as to the existence of the mistake, for it is conceded on every side that precisely the very mistake which is claimed to have been made was made honestly and unintentionally.

And yet the United States Circuit Court of Appeals has held that a court of chancery is powerless under such circumstances, and is bound to enforce a forfeiture resulting from the occurrence of a mistake of so serious a character as that which is conceded to have been made in this case.

IV.

The Circuit Court of Appeals overlooked the grave and important question presented by the fact that, notwithstanding the temporary injunction rendered in this action, and before the petitioner was or could be defaulted, the defendants entered into a contract with Whitmore, Rauber & Vicinus for the construction of the conduit line which was the subject of the petitioner's proposal, and that such construction has been completed, thus making performance by the petitioner's impossible.

Thus far the petitioner has not been in default with respect to the execution of the contract, as required by the defendant's resolution. Before the time for such execution arrived the defendants were stayed by injunction from declaring a forfeiture. Almost contemporaneously with the service of such injunction a contract was entered into with other contractors, which has been performed, for doing the very work on which the petitioner made its bid.

The defendants are not now in a position to enable the petitioner to perform its contract, if it should now be ready and willing to enter into such a contract. By the defendant's acts, therefore, performance by the appellee of their requirements has been rendered impossible, and they should be enjoined from seeking to impose a forfeiture on the petitioner, and to enforce a penal bond under such circumstances as those here disclosed.

United States vs. Peck, 102 U. S., 64.
Shaw vs. Republic Life Ins. Co., 69 N. Y., 285, 293.
Mansfield vs. N. Y. C. & H. R. R. Co., 102 N. Y., 211.

Bogardus vs. New York Life Ins. Co., 101 N. Y., 328.
Taylor vs. Risley, 28 Hun, 144.

U. S. vs. Peck (supra) bears strong resemblance to this phase of the case under consideration. There Peck contracted with a military officer to deliver a quantity of hay to the military station at Tongue River in the Yellowstone region. It was contemplated that the hay was to be cut at the Big Meadows, near the mouth of the river. The Government officers, fearing that Peck would not carry out his contract, and it being absolutely necessary to obtain the hay, allowed other parties to cut the hay at Big Meadows, and therewith to supply the station at an increased expense. It was held that the act of the Government officers excused Peck's non-performance, on the authority of *Fleming vs. Gilbert, 3 Johns., 527*, and the principle just stated.

If the temporary injunction had been dissolved and the petitioner had expressed a willingness to enter into a contract with the defendants, the latter could not have made such a contract after January 20, 1893, when it accepted the proposal of Whitmore, Rauber & Vicinus.

To withhold relief under these circumstances, and to place the defendants in a position to insist upon the enforcement of the penal liability on the bond, would not only be unjust and inequitable, but would smack of confiscation.

2 Beach Modern Equity Jurisprudence, § 1013.

V.

The assertion that the petitioner's error was due to Burlingame's negligence, even if true, would not debar it from relief under the circumstances disclosed by the record.

While it is true that Mr. Burlingame, in a moment of self-humiliation and contrition, declares there was gross carelessness on his part, yet, viewing all of his testimony, it is evident that, in the preparation of his bids, he acted in good faith, was as careful as he could possibly be, but that, owing to the unexpected and unwonted responsibility which had been placed upon him, the hurry and excitement incident to the examination of all the numerous details, the many interviews upon the varied subjects with which he was engaged, his nervousness and near-sightedness, the haste in which he was required to insert his prices into the blanks, the late arrival of Mr. Moffett, he was unable to check his work and to discover the errors which he had made through inadvertence.

The straits to which the defendants are reduced are apparent from their argument that Mr. Moffet's detention by business in Boston was the cause of the non-discovery of the clerical error, and constituted negligence.

Considering Burlingame's long years of experience, his high character and unquestioned ability, the petitioner was justified in detailing him for the preparation of the bids, in the absence of Mr. Hodgkins, and a charge of negligence, either against it or Mr. Burlingame, is unwarranted.

But even assuming that Mr. Burlingame was negligent, both in that he made the initial error and because he did not discover it before presenting the bids (although he attempted to remedy it

immediately upon discovery), it is insisted that such negligence does not afford an answer to the petitioner's demand for equitable intervention. If it were, there is scarcely a case in which relief has been granted, either by reformation or rescission of contracts entered into by mistake, in which it might not have been asserted that the petitioner was guilty of negligence in not discovering the mistake from which he desired to be relieved.

This idea is well illustrated in the case of *Albany State Savings Institution vs. Burdick*, 87 N. Y., 40, where Judge EARL said, considering a similar objection interposed to the claim made by the grantee whose deed provided for the assumption of a prior mortgage, which deed he failed to examine and did not discover the mistake:

"Indeed, in most of the cases to be found in the books where relief has been sought against written instruments on the ground of fraud and mistake, the complaining parties were chargeable with the same kind of negligence which exists in this case—to wit, the omission to read or understand the contents of instruments executed or accepted. It has certainly never been announced as the law in this State that the mere omission to read or know the contents of a written instrument should debar any relief by way of reformation of the instrument on account of mistake or fraud. It is the general rule that where a written instrument failed to conform to the agreement between the parties in consequence of the mutual mistake of the parties, however induced, or the mistake of one party and fraud of the other, a court will reform the instrument so as to make it conform to the actual agreement between the parties.

"In the case of *Wells vs. Yates* (44 N. Y., 525), so far as can be perceived from the facts stated, there was the same room for charging the plaintiff with negligence in not understanding the contents of the deed executed by him as there is for charging Mrs. Burdick with negligence in this case, and yet the deed was reformed.

"In the case of *Botford vs. McLean* (45 Barb., 478), the facts were as follows: Upon a sale of personal property the purchasers agreed to pay therefor the sum

of $6,000, viz.: $2,000 in cash, and the balance in four equal annual payments, with interest, for which they were to execute their four several promissory notes for one thousand dollars each, with interest, payable in one, two, three and four years, and to secure the payment thereof by a chattel mortgage upon the property. $2,000 was paid down, and the chattel mortgage was executed, conditioned for the payment of the notes, with interest. Four several promissory notes were also executed by the purchasers for $1,000 each, payable at the time as agreed, but two of them were so drawn as not to bear interest. The vendor, seeing that two of the notes were on interest, assumed that the other two were also on interest, and accepted the same, believing that all were properly drawn. The purchasers, knowing that two of the notes were so drawn as not to bear interest, purposely abstained from calling the vendor's attention to the fact. It was held that there was a mistake on one side and fraud upon the other, and that the two notes should be reformed so as to conform to the actual agreement between the parties, and the decision was affirmed in this Court in 1870. In that case there was a certain degree of negligence in not reading the two notes. It is said by the learned counsel for the plaintiff, in the argument before us, that there was artifice used in that case to induce the plaintiff to believe that the two notes were drawn, with interest, that artifice being in drawing, and placing before the plaintiff the first two notes payable with interest, by which the payee was thrown off his guard; but that circumstance was not the basis of that decision, and does not distinguish that case from this. There was nothing there to prevent the payee from reading the notes, and he had abundant opportunity to do so. If he had read them the mistake and fraud would have been discovered. * * *

"In the case of *Andrews vs. Gillespie* (47 N. Y., 487), the attorney who drew the mortgage made it payable in five years instead of ten, as agreed between the parties, and it was held that the mortgagor could have it reformed. There the mortgagor could have discovered the mistake by simply reading the mortgage. No artifice was used to prevent him from reading it. He executed it believing that the attorney had drawn it correctly, just as Mrs. Burdick in this case accepted the deed believing it had been drawn correctly, and the fault or negligence was just as great in the one case as in the other."

In *Keister vs. Meyrs*, 115 Ind., 312, it was held that the mere fact that a mortgagee accepts a mortgage with an incomplete description of land does not bar him from relief in equity because of negligence.

Although negligence has, in some cases, been held to be of such a character as to debar a recovery, it is believed that in every such case the negligence which was held sufficient to warrant the withholding of relief was that of the party who demanded it and not that of a third person, whatever his relation may have been to the complainant.

This thought is well illustrated by the numerous cases where mistakes in written instruments have been corrected in equity, although such mistakes were occasioned by the ignorance, mistake or negligence of the draughtsman.

Drury vs. Hayen, 111 U. S., 223.
Elliott vs. Sackett, 108 U. S., 132.
Crippen vs. Baumes, 15 Hun, 136.
Wheeler vs. Kirkland, 23 N. J. Eq., 13.
Canedy vs. Marcy, 13 Gray, 373.

A mistake made by a clerk in computing the amount due on a promissory note may be corrected in a court of chancery.

Bartell vs. Roderick, 34 Iowa, 517.

It does not matter whether the draughtsman who was guilty of negligence was the agent of the party seeking the correction or of the other party.

Menominee, &c., Co. vs. Langworthy, 18 Wis., 444.

In *Webster vs. Cecil*, and in the cases in 24 and 61 Conn., it might with equal justice have been urged that there was negligence which would preclude relief. Yet, there was no withholding of relief.

Here, if there was negligence in the true sense of the word, it was of the most innocent character. There was an immediate attempt to retrieve the error. The defendants suffered no injury in consequence

thereof. They did not alter their position to the slightest extent. They lost nothing which they had. They were deprived of nothing to which they were entitled. They suffered no inconvenience. The petitioner was ready to enter into a contract at a price which even with the errors corrected would have been far more favorable to the defendants than the contract which they eventually made and permitted to be performed.

To enable the defendants, therefore, to take advantage of Burlingame's negligence, if such it may be termed, and to enforce the penal liability embodied in the petitioner's bond, would permit them to profit from a negligent act which has in nowise been a source of damage to them but of incalculable injury to the appellee.

VI.

The petitioner did not have an adequate remedy at law, and had the right to resort to equity for relief.

The rescission of contracts on the ground of mistake is one of the well-established heads of equity jurisprudence.

Cases in which such relief has been granted are numerous.

Hazard vs. Griswold, 141 U. S., 260, is a recent illustration of great value.

What the petitioner desired was to prevent the forfeiture and enforcement of its bond and to procure a cancellation of its proposal, because, under the circumstances, it would have been unjust, harsh and inequitable to have enforced such forfeiture.

If the petitioner had not resorted to equity and had failed to enter into a contract with the City of Rochester

at the time designated in the latter's notice, there would have been a violation by it of the terms of its bond which would have given rise to an action for its enforcement. In an action at law thus instituted, the facts disclosed by the record would not have constituted a defense. A court of law would have been bound to enforce the contract according to its terms, and the petitioner would have been held to the letter of its contract.

It is from the very fact that a court of law is powerlass to grant relief against accidents and mistakes that courts of chancery have taken to themselves the consideration of causes in which relief is required against the legal effect of contracts, or situations resulting from accidents and mistakes.

The defendants are unable to point to a single case in which a court of law has assumed to permit a defense to a bond to be interposed based upon allegations such as are made in this case.

As instances of the necessity of resorting to equity where relief could not have been obtained in an action at law, attention is called to the following cases:

Clute vs. Konies, 102 N. Y., 377.
Martin vs. Melville, 11 N. J. Eq., 222.
Rowley vs. Empire Insurance Company, 36 N. Y., 550.
Hay vs. Star Fire Ins. Co., 77 N. Y., 235.
Fink vs. Queen Ins. Co., 24 Fed Rep., 318.
Muldrow vs. Norris, 2 Cal., 74.

The defendants, however, claim, that under the New York Code of Civil Procedure equitable defenses may be interposed to an action at law, and relief by way of reformation or rescission may be granted in such an action, and *Pitcher vs Hennessey, 48 N. Y., 415*, and *Born vs. Schrenkeisen, 110 N. Y., 55*, are cited to sustain the position.

But these authorities strongly fortify the petitioner's position. In the first the contract sued upon did not express the actual agreement of the parties. The defendant pleaded the mistake and prayed for a reforma-

tion of the contract by way of counterclaim, and under the mixed system authorized by the Code of mingling legal and equitable defenses, the defendant was held entitled to relief.

In the second case it was expressly held that where, in an action at law upon a written contract the defendant claims a mistake and seeks to have the contract reformed because thereof, he should allege the facts entitling him to the reformation *by way of counterclaim, and should pray judgment for such reformation.*

Such is the rule laid down in *Pomeroy on Remedies and Remedial Rights, § 95; Bank vs. Tucker, 42 Cal., 346,* and was the practice pursued in *Andrews vs. Gillespie, 47 N. Y., 487.*

The same rule necessarily applies where instead of a reformation of the contract, rescission and an injunction are demanded.

Hartford Fire Ins. Co. vs. Bonner Mercantile Co., 44 Fed. Rep., 155, 156.

The very fact that the defense is required to be pleaded, by way of counterclaim, indicates that it constitutes ground for affirmative relief and may be made the subject matter of an independent cause of action. The same considerations which recognize the right to equitable relief, when asserted as a defense, must necessarily uphold the right of a court of equity to afford the same relief, whenever resort is taken to it.

A party who is sought to be held under a contract or instrument, which does not embody his intention, and against which he is entitled to relief, is not bound to await the convenience of his adversary who may at some indefinite time seek to enforce it in a court of law, but may anticipate the impending attack by seeking prompt redress in chancery.

Whatever may be the rule in the State Court, it is well settled that equitable defenses will not be permitted to be pleaded in an action at law brought in the Federal Courts. There the distinction between law and

equity has never been abolished, and there can be no mingling of legal and equitable remedies or causes of action.

Bennett vs. Butterworth, 11 How., 669.
Foster vs. Mora, 98 U. S., 425.
Northern Pacific Railroad Co. vs. Paine, 119 U. S., 561.
Johnson vs. Christian, 128 U. S., 374.
Montejo vs. Owen, 14 Blatchf., 324.
Buller vs. Sidell, 43 Fed. Rep., 116.
Hartford Fire Ins. Co. vs. Bonner Mercantile Co., supra.

This rule has been applied to actions brought in State Courts in which equitable defenses were properly interposed, but which were subsequently removed into the Federal Court.

Northern Pacific R. R. Co. vs. Paine, supra.

Mr. Justice FIELD said:

"In the courts of the United States to legal actions legal defenses only can be interposed. *If the defendant have equitable grounds for relief against the plaintiff he must enforce them by a separate suit in equity.* If his equitable grounds are deemed sufficient he may stay the further prosecution of the action at law or be furnished with matter which may be set up as a legal defense. Upon the removal, therefore, of the action to the Circuit Court the equitable defense could not be considered."

In this case the Federal Court has jurisdiction of the parties and the subject matter, and such jurisdiction cannot be limited, restrained or affected by any State legislation, by virtue of which the defendants assert the existence of an adequate remedy at law.

Payne vs. Hook, 7 Wall., 425.

VII.

It is respectfully submitted that a writ of certiorari should be directed to the United States Circuit Court of Appeals for the Second Circuit for the certification of the record herein to this Court.

LOUIS MARSHALL,
Petitioner's Counsel.

Hunt & Carter
of Counsel for
Petitioner

CIRCUIT COURT.

N. D. NEW YORK.

AUGUST 18, 1897.

MOFFETT CO.

AGAINST

CITY OF ROCHESTER ET AL.

LOUIS MARSHALL and JOSEPH MULLIN, for complainant.

WILLIAM F. GOGSWELL and A. J. RODENBECK, for defendants.

COXE, District Judge:

The question in this controversy is plain and simple: Shall the complainant be held to an erroneous bid by which it agreed to do certain work for the City of Rochester for $63,800 less than was intended? The work related to the construction of a conduit to convey the water of Hemlock Lake to the city. By a mistake of Mr. Burlingame, its engineer, the complainant bid two cents per cubic yard for earth excavation in open trenches when it intended to bid 70 cents, and $1.50 for earth excavation in tunnel when it intended to bid $15. The proof of these mistakes is clear, explicit and undisputed. As soon as the item proposing to do the work for 50 cents, as aforesaid, was read at the meeting of the executive board, and before any action was taken thereon, Mr. Burlingame stated that it was an error, and that complainant intended to bid for route B the same as for route A, viz., 70 cents. There is some testimony of a negative character that this prompt repudiation of the bid did not take place, but the great weight of testimony is in favor

of the complainant. Had the errors been corrected, the complainant's bid would still have been $200,000 below the next lowest bid. On route A the complainant's bid was $903,324. The mistakes all occurred on route B, and yet route A was selected and the work awarded to other bidders for $1,123,920, or $220,596 more than the complainant's proposal

Upon the principal issue there is no disputed question of fact. Counsel for the defendants, though not admitting the mistakes, which are the basis of the action, do not dispute them. The oral argument proceeded upon the theory that the mistakes were made precisely as alleged. In order that no injustice may be done to the defendants, their position in this regard is stated in the language of their brief as follows:

"We admit that the evidence of the complainant shows that Mr. Burlingame entered in his proposal sheets certain figures and numbers different from those which he intended to make, and that the defendants have no evidence to contradict this testimony."

The facts being undisputed the question is one of law. It would seem almost a reproach to our jurisprudence if equity shall be compelled to express itself helpless in such circumstances. To grant the relief asked for does no injury to any one. To refuse it entails upon the claimant the possible loss of $90,000; a penalty so out of proportion to its fault that its enforcement would seem repugnant to those principles of natural justice which are the foundation of all law. The learned senior counsel for the defendants concede that were this a dispute between individuals "the one making the proposal can undoubtedly withdraw the same at any time before acceptance by the person to whom such proposal is made." He concludes, however, that the rule is different where competitive proposals are invited for public work. Why this difference the Court is unable to perceive. The law is based upon broad, general rules applicable alike to individuals and corporations. A party dealing with a municipal cor-

poration should not be held to the strict letter of his agreement where he would be released if dealing with an individual. But it is argued, though relief might be granted in other circumstances, there can be none here, for the reason that the charter of the City of Rochester provides that "neither the principal nor sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made, and the same shall have been duly executed." It is thought that this clause is not applicable to the peculiar facts here shown. The complainant is not endeavoring "to withdraw or cancel a bid or bond." The bill proceeds upon the theory that the bid upon which the defendants acted was not the complainant's bid; that the complainant was no more responsible for it than if it had been the result of agraphia or the mistake of a copyist or printer. In other words, that the proposal read at the meeting of the board was one which the complainant never intended to make, and that the minds of the parties never met upon a contract based thereon. If the defendants are correct in their contention there is absolutely no redress for a bidder for public work, no matter how aggravated or palpable his blunder. The moment his proposal was opened by the executive board he is held as in a grasp of steel. There is no remedy, no escape. If, through an error of his clerk, he has agreed to do work worth $1,000,000 for $10, he must be held to the strict letter of his contract, while equity stands by with folded hands and sees him driven into bankruptcy. The defendants' position admits of no compromise, no exception, no middle ground.

It is argued that the mistakes were not mutual, and therefore that there is no ground of equitable cognizance. It should be remembered, however, that the complainant does not seek to reform a contract, but to be relieved from an unconscionable bid by its rescission or cancellation. Equity cannot reform an agreement unless both parties were mistaken, but it can interfere

to prevent the enforcement of an unjust agreement induced by the mistake of one. This principle is well expressed in 15 Am. & Eng. Enc. L., p. 647, as follows:

"Equity will not reform a written contract unless the mistake is proved to be the mistake of both parties, but may rescind and cancel a contract upon the ground of a mistake of facts, material to the contract, of one party only."

Prof. Pomeroy says:

"Cancellation is proper when there is an apparently valid written agreement or transaction embodied in writing, while in fact, by reason of a mistake of both or one of the parties, either no agreement at all has really been made, since the minds of both parties have failed to meet upon the same matters, or else the agreement or transaction is different, with respect to its subject matter or terms, from that which was intended" (2 Pom. Eq. Jur., § 870).

See, also, Crowe vs. Lewin, 95 N. Y., 423; Smith vs. Mackin, 4 Lans., 41; Bradford vs. Bank, 13 How., 57, 68; Railroad Co. vs. Jackson, 24 Conn, 514; Snell vs. Insurance Co., 98 U. S., 85.

It is said that the complaint has an adequate remedy at law. This objection does not appeal strongly to the Court in a case where all the parties are on the record, where all the facts bearing upon the transaction have been collected with great diligence and expense, and where the questions in dispute have been fully and ably debated. In such circumstances the Court should not, unless compelled to do so, adopt a course which will render nugatory all this labor and expense. Believing that the complainant is entitled to relief, the duty of granting should not be devolved upon another tribunal in order that a doubtful theory may be vindicated. But is there a legal remedy? How could the complainant in an action on the bond take advantage of its mistakes? If a court of law could not declare the proposal rescinded for mistake, it would be compelled to treat the complainant as in

default and enforce the bond. The complainant is entitled to a decree rescinding its proposals and enjoining the defendants as prayed for in the bill.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

THE MOFFETT, HODGKINS & CLARKE COMPANY,
Appellee,

vs.

THE CITY OF ROCHESTER ET AL.,
Appellants.

WALLACE, Circuit Judge:

By the decree appealed from the complainant has been released from the obligation to enter into and perform a contract with the City of Rochester for the construction of certain municipal works conformably to the terms of a written proposal delivered by the complainant to the Executive Board of said city. The decree adjudged the proposal void and ordered it rescinded, upon the theory that it embodied terms inserted by the mistake of the complainant. The case presents the general question of the power of a court of equity to rescind a contract on the ground of mistake.

Under the provisions of the charter of the City of Rochester the Executive Board have control of the

water works of the city and authority to let contracts for such extensions and additions as it may from time to time determine to make. In December, 1892, the board, having determined to make extensions and additions, invited proposals for contracts, among them for those known as contract No. 1 and contract No. 2. This was done pursuant to Sect. 172 of the charter, which reads as follows: "The Executive Board is hereby directed to cause a notice to be published in one or more of the daily newspapers of said city, at least ten days before the letting of any contract, for sealed proposals therefor, each to be accompanied by a bond signed by at least two responsible sureties, conditioned that the person, firm or corporation making such bid, if it is accepted, will perform the work or furnish the materials, or both, mentioned in such proposals, and fulfill any contract that may be made with him, them or it, and the amount specified in the bond shall be recoverable thereon in case the proposer fails to perform the conditions of the bond and its accompanying proposal; such bids shall be opened on the day named in such notice. Said board may let any contracts as it deems for the best interests of taxpayers, but it shall publish all bids received by it, and the persons, firms or corporations to whom contracts are awarded. Such contracts shall be enforceable by and in the name of the City of Rochester, or said Executive Board as such. Neither the principal or sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made, and the same shall have been duly executed."

Contract No. 1 contemplated the construction of a masonry conduit for a distance of 12,000 feet from Hemlock Lake northward. Contract No. 2 contemplated the construction of a riveted steel-pipe conduit either 38 or 40 inches in diameter, and 140,000 feet long, commencing at the north end of said masonry conduit, and terminating at Mt. Hope Reservoir, with an option to the Executive Board of selecting either

one of two different routes (designated as "A" and "B") over a length of about 8,000 feet.

The notice inviting bids required separate bids for the different contracts. It stated that the award would be made as soon as practicable after the bids were publicly opened and read, and that after the delivery of the bids to the board "the bid cannot be withdrawn." The complainant, a corporation engaged in the contracting business, submitted proposals for each of the two contracts. Each was distinct in itself, but instead of being enclosed in a separate sealed envelope, as required by the notice to the bidders, the complainant enclosed and delivered both under one cover.

The proposals of the various bidders for the work were opened by the board at the time specified in the notice, and severally read in the presence of the bidders. For contract No. 1 the bid of the complainant was about $81,000 higher than that of the lowest bidder. For contract No. 2, route "A," 38-inch pipe, the bid of the complainant was $903,324, being about $220,000 below that of the next lower bidder, and for route "B," 38-inch pipe, the bid of the complainant was $857,552, being about $273,000 below that of the next lowest bidder.

The evidence satisfactorily proves that the complainant made a clerical error in inserting in the proposal for Contract No. 2, route "B," the price of fifty cents instead of seventy cents per cubic yard for certain earth excavations (of the estimated quantity of 184,000 cubic yards), whereby the total amount of the bid, when the various items were tabulated, was $36,800 lower than it would otherwise have been. The evidence also indicates that the complainant made an erroneous estimate of the cost of certain tunnel excavation by omitting to take into consideration certain features of the work, and, in consequence, inserted in that proposal the price of one dollar and fifty cents per cubic yard, whereas it would have otherwise inserted a price of fifteen dollars. At the estimated quantity of this excavation, the bid was $27,000 less

than it would have been at fifteen dollars per cubic yard. These errors were doubtless attributable to the haste in which the specifications were considered and the proposals prepared by the complainant, a haste which was unnecessary and almost inexcusable. At the time of the public reading of the bids the complainant called the attention of the board to the mistake in the price for the earth excavation, but did not mention the other alleged error. It did not ask to withdraw the bid, and took no further action in that behalf until about twenty days thereafter, and when the board had already awarded contract No. 1 to the lowest bidder. The complainant then sent a communication to the board insisting that its bid for the whole work included in contracts No. 1 and No. 2 was a single proposal, protesting against letting the two contracts to different contractors, and stating that clerical errors had been made in the proposal for contract No. 2, route "B," in the prices for earth excavation and tunnel excavation, and the details of the errors. The communication concluded as follows: "We, therefore, respectfully request either that the contract in its entirety for both sections of the work be awarded to us, at the corrected prices, or that we may be allowed to withdraw our proposal." The board, after receiving this communication, adopted resolutions awarding contract No. 2, route "B," to the complainant. Thereupon the complainant commenced the present action.

It is manifest that one of the alleged mistakes—that in respect to the tunnel excavation—was not a mistake in any legal sense, but was a negligent omission arising from an inadequate calculation of the cost of the work. Courts cannot permit such omissions to be brought forward by those who make them as a ground for receding from their engagements. The party in fault must have exercised at least the degree of diligence which may be fairly expected from a reasonable person.

It is also manifest that the complainant did not in-

tend to give the board an opportunity to correct the mistakes and award the contract on the corrected basis. There was no color of foundation for the assertion that the proposals were to be treated as a single bid for contracts No. 1 and No. 2, and that both contracts must be awarded to the complainant or neither. The position thus taken by the complainant was well calculated to excite distrust on the part of the board and induce its members to believe that the alleged mistakes were an afterthought, conceived when the complainant had become convinced by studying the proposals of its competitors that it could not profitably carry out the contract on the terms proposed.

The case differs quite radically from any reported in the books arising under the head of mistake. The contract contemplated an extensive and important undertaking, the cost of which could only be intelligently estimated after a thorough investigation of all the conditions by competent experts. It was to be let, after a competive bidding, by a board of public officers who were not permitted to exercise any favoritism or indulgence, who were required by law to consult alone the interests of the municipality they represented, and who would be exposed to just censure if they should tolerate any modification of a proposal in his own favor by a bidder. The statute, as well as the notice to bidders, informed all bidders that a proposal once submitted could not be withdrawn. A proposal made under such circumstances is entitled to be regarded as having some attribute of finality which do not belong to ordinary contracts.

Although the charter provisions do not preclude any relief by the Court to a bidder in a proper case, it is designed in order to protect the city from the danger of collusion between the board and bidders, or between bidders themselves, to constitute a proposal a perfect contract as regards the bidder from the time of its delivery to the board. The statute would be a nullity if the board or the Courts could rescind such a contract whenever the bidder had made a mistake in the terms

of his proposal. The nature of the contract forbids the Court to interfere with it, much less to annul it, upon any latitudinarian notions of the doctrine of mistake as administered in equity.

The general doctrine is succinctly expressed in A. and Eng. Enc. of Law, Vol. 15, page 628, as follows: "In order that a mistake may come within the cognizance of a court of equity, it must be shown to be; first, material, or the moving cause of the complaining party's action; second, mutual, or shared in by both parties to the transaction; third, unintentional, and fourth, free from negligence." The salutary power of courts of equity to rescind or reform contracts which do not express the real intention of the parties is not to be extended to cases where the contract because of the mistake of one of the parties fails only to express the meaning of that party, and he seeks relief purely on the ground of his own mistake. The correct rule is as stated in Addison on Contracts: "Wherein a mistake is unilateral, and the party by whom it was made is the sufferer, relief will not be granted unless there has been some undue influence, misrepresentation, surprise, or abuse of confidence" (Vol. 2, 1183).

The court below adopted the opinion which has been sometimes expressed *obiter* by Judges, and frequently quoted by text writers, that equity will not reform a written contract unless for the mistake of both parties, but may rescind and cancel one upon the ground of a mistake by either. Thus, it is said in Dulany vs. Rogers (50 Md., 533), "A mistake on one side may be ground for rescinding, but not for reforming a written agreement." See also Dinan vs. Railroad Co. (5 R. I., 130); Hearne vs. Insurance Company (20 Wal., 491); Smith vs. Mackin (4 Lansing, 41). The opinion seems to have originated in the observation in Mortimer vs. Shortall (2 Drury & Warren, 373), that "a mistake on one side might be a ground for rescinding a contract, but could never be relied on as a reason for taking from a man what he thought he was to get under his agreement," an observation which is neither lucid nor logical when

read disconnected from the contract. What the proposition means, and all it means, is that a contract cannot be reformed into a new contract for the mistake of one party only, but may be rescinded for a mistake of one party whenever the circumstances of the case are such that it would be inequitable to allow the other party to enforce it, and inadequacy of consideration alone is not such a circumstance. Eyre vs. Potter (15 How., 58, 59). A very extended examination of the reports has failed to disclose a case in which a judgment rescinding a contract has proceeded solely upon the ground that the terms as reduced to writing, although expressing the understanding of one party, did not express that of the other. In all the reported cases where there was not the element of mutual mistake, or mistake of one side with knowledge on the other there was, in the language of Addison, "Some undue influence, misrepresentation, surprise or abuse of confidence," or the contract was so oppressive as to be unconscionable.

The Courts have refused to reform contracts and decreed rescission where it was plain that the terms did not represent the real agreement of the parties, and it was not satisfactorily proved what were the terms of the real agreement in its entirety, or where the further terms could not be given effect without contravening the Statute of Frauds. So, also, there are many cases in the reports where the Courts have refused to decree specific performance of contracts which, because of the mistake of one party, did not embody his understanding, and in these cases the plaintiff was left to his remedy at law. They proceeded on the principle that a court of equity, in the exercise of judicial discretion, will sometimes refuse specific performance of a contract which it would not order to be delivered up; for, to use the language of Lord ELDEN, "the distinction is always laid down that there are many cases in which the party has obtained a right to sue upon the contract at law, and under such circumstances that his conscience cannot be affected there so as to deprive him of

that remedy, and yet, on the other hand, the Court declaring he ought to be at liberty to proceed at law will not interpose actively to aid him, and specifically enforce the contract. Morlock vs. Buller (10 Ves., Jr., 307). The exposition of the principles is given by Chief-Justice SHAW in Western Railroad Company vs. Babcock (47 Mass., 352), thus: "In an application to a court of equity for a specific performance, a decree for such performance is not a matter of strict right on the proof of the agreement, but may be rebutted by showing that to require such an execution would be inequitable. A defendant, therefore, may not only show that the agreement is void by proof of fraud or duress, which would avoid it at law, but he may also show that without any gross laches of his own he was led into a mistake, by an uncertainty or obscurity in the descriptive part of the agreement, by which he in fact mistook one line or one monument for another, though not misled by any misrepresentation of the other party, so that the agreement applied to a different subject from that which he understood at the time; or that the bargain was hard, unequal and oppressive, and would operate in a manner different from that which was in the contemplation of the parties when it was executed. In either of these cases equity will refuse to interfere, and will leave the claimant to his remedy at law."

A review of the multitude of adjudged cases upon the point is impracticable, but those which are cited and relied upon by appellee as sustaining the proposition that a court of equity will rescind a contract merely for the mistake of one party will be referred to and considered. They are: Smith vs. Mackin, 4 Lansing, 41; Ryder vs. Powell, 38 N. Y., 310; Jackson vs. Andrews, 59 N. Y., 244; Crow vs. Lewin, 95 N. Y., 423; Griswold vs. Hazard, 141 U. S., 260; Webster vs. Cecil, 30 Beven, 62; Hartford, etc., Railroad Company vs. Jackson, 24 Conn., 514; Rowland vs. New York, etc., Railroad Company, 61 Conn., 103.

Smith vs. Mackin was a case where the plaintiff had

agreed in writing to surrender possession of certain real estate supposing it to be a part only of that which was included in the description, and, having discovered that the description covered the whole, brought an action to rescind the agreement. As the Court states in the opinion: "The defendant knew how the fact was at the time the contract was made, and was also aware of the plaintiff's misapprehension in regard to it." The case was one where the defendant's conduct was unconscionable.

Ryder vs. Powell was an action to reform a bond and mortgage. As expressed, the bond and mortgage did not correspond with the agreements of the parties, which fact the plaintiff discovered the next day. The defendant knew all along that it did not. His conduct was unconscionable.

Jackson vs. Andrews was an action brought to reform a deed given by the plaintiff to the defendant, and also a mortgage given by the defendant to the plaintiff, upon the theory that the land was to be conveyed without a warranty of title, and that the covenants of warranty in the deed were inserted by the fraud of the defendant or by mutual mistake, and the plaintiff sought to reform the mortgage by inserting a covenant by the defendant that the entire principal should become due after default in payment of any installment of principle or interest for thirty days. Issues of fact were submitted to a jury, and of their findings the Court observed: "It will be seen that, while this verdict furnishes evidence that the plaintiff may not have known fully the facts perhaps the contents of the paper executed and received by him, it utterly fails to show that the defendant ever agreed, or understood that he was to receive a deed of the lots without covenants as to title, or to give a mortgage containing any provisions in addition to that delivered by him." The Court held that the Court below properly refused to decree for reformation.

Crow vs. Lewin was an action brought to rescind a contract for the exchange of land for which convey-

ances had been executed. The Court said: "In this case the minds of the parties never met. The contract in form was not a contract in fact. It originated in mistake, and that mistake not mutual and about the same thing, but different on the part of each. What one meant to sell the other did not mean to buy, and what one meant to buy the other did not mean to sell." A decree was entered requiring a reconveyance by the parties respectively, thus rescinding the transaction. The case was one where the contract did not express the intentions of either party.

Griswold vs. Hazzard was an action to cancel or reform a bail bond by one of the sureties. Referring to the conclusion that the bond ought not to be allowed to stand uncorrected, the Court said: "If it be not justified on the ground of mistake as to the mutual agreement, superinduced by the conduct of the party seeking now to take advantage of it, there could be no escape from the conclusion that the taking of a bond that made Griswold absolutely liable as surety for any amount adjudged to be due from Durant, and not greater than the penalty so named, was under all the circumstances disclosed a fraud in the law upon him."

Webster vs. Cecil was an action to rescind an agreement for the sale of lands evidenced by a written proposal by one party and a written acceptance by the other. The proposal of the vendor, by inadvertence on his part, named a price which was less than half that which he had just refused, upon the offer of the vendee, during the negotiations. The case was one where the vendee knew when he transmitted his acceptance that the proposal did not express the intention of the vendor.

The cases 24 Conn., 514, and 61 Conn., 103, were actions at law where the question was whether a railroad company was entitled to charge its ordinary freight rates for carrying after there had been a preceding negotiation in which the minds of the parties had not met in respect to a different rate. They throw little light upon the present question.

In the opinion of the Court below, some of the foregoing adjudications were cited, and, in addition, the cases Bradford vs. Union Bank (13 How., 57), and Snell vs. Insurance Company (98 U. S., 85), were cited.

Bradford vs. Union Bank was a bill for specific performance of an agreement by the defendants to convey land. So far as the case involved the question of mistake, it was one of a mutual mistake of parties.

Snell vs. Insurance Company was a suit to reform a policy of insurance. The Court said: "We have before us a contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed. In the attempt to reduce the contract to writing there has been a mutual mistake, caused chiefly by that party who now seeks to limit the insurance to an interest in the property less than that agreed to be insured. The written agreement did not affect that which the parties intended. That a court of equity can afford relief in such a case is we think well settled by the authorities."

A court of equity cannot undertake to make a contract for parties which they have not made themselves, and would equally transcend its just powers by compelling a party to relinquish the fruits of a contract which he has honestly made and in which there is no taint of wrong to affect his conscience. The rescission or cancellation of a contract is certainly as drastic an interference with its provisions as a modification of it. The consequences may be equally or even more injurious to the party who is deprived of the benefit to which he is entitled by it; and there is no sound reason, and as we think no well-considered authority, for the proposition that although a court of equity will not reform a contract except for the mistake of both parties, it will rescind one merely for the mistake of one party.

"It would be the height of injustice to alter a contract on the ground of mistake; where the mistake arises from misconception by one of the parties, in con-

sequence of his imperfect explanation of his intentions. To make a contract it is requisite that the minds of the contracting parties agree on the act to be done; if one party agrees to a contract under particular modifications, and the other party agrees to it under different modifications, it is evident that there is no contract between them. If it be clearly shown that the intention of one of the parties is mistaken and represented by the written contract, that cannot avail unless it further be shown that the other party agreed to it in the same way, and that the intention of both of them was by mistake misrepresented by the written contract." SPENCER, C. J., in Lyman vs. United Insurance Co. (17 Johnson, 376); see, also, Nevins vs. Dunlap (33 N. Y., 676); Ger. Am. Ins. Co. vs. Davis (131 Mass., 316); Luddington vs. Ford (33 Mich., 133); Dyas vs. Stafford (7 L. R. I., 606). These observations are as opposite to an attempt to rescind a contract as to an attempt to reform one.

By the decree of the Court below the contract completed by the terms of the proposal has been completely annulled. It may have been an improvident contract on the part of the complainant, but clearly justice would have required nothing further if the contract had been an ordinary one, entered into by a proposal and acceptance, than to reform the contract so as to correct the mistake, and, as reformed, permit the City of Rochester to have the benefit of it. As it is, the complainant has been wholly absolved from the obligations of a contract which it deliberately entered into, and which it was the legal duty of the Executive Board to cause to be fulfilled. If the complainant in his bill had prayed for a reformation, and offered to execute the contract when so reformed as to correct its own mistakes, it would have presented itself in an attitude which would at least have commanded the sympathy of the Court. As the case has been presented, it seems to be without equity, and the decree is therefore reversed with costs, and with instructions to the Court below to dismiss the bill.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

THE MOFFITT HODGKINS AND CLARK COMPANY

vs.

THE CITY OF ROCHESTER ET AL.

SHIPMAN, C. J.:

I concur in the result reached in this case, but not in all the restrictions which the opinion will be construed to place upon the power of a court of equity, either to reform or rescind contracts upon the ground of mistake. The word mistake is of so broad a character and includes so many varied circumstances that rules which undertake to define what a court of equity can do or cannot do in regard to the correction of a mistake, either unilateral or mutual, seem to me to confuse rather than to enlighten. Each case must in a great measure be governed by its own circumstances which appeal or do not appeal to the judgment or conscience of the Chancellor.

If the case now under consideration was simply that the complainants offered to do specified work and nothing else for the City of Rochester for about $857,000, that in this single proposal there was a clerical error of about $36,000, notice of which was communicated to the city when the proposal was being read, that it was accepted as written, that the fact of the mistake was hardly denied and clearly appeared upon judicial investigation, it would seem to me that the power of a court of equity to purge a contract from such an error, upon such terms as should be just to

the city, or to rescind it entirely if the amendment was found to be impracticable, ought to be generally recognized.

This record presents other circumstances which are important. After the bid of another party upon contract No. 1 had been accepted, complainant protested that it was entitled to both contracts—an assertion which the city's proposals showed to be without foundation—and offered to do all the work upon the correction of the two alleged errors in No. 2—a proposition which it was impossible for the city to accept. At this stage of the business the complainants wanted to do the entire work, and apparently wanted nothing else. Their conduct compelled the city's agents to go forward and complete the award of contract No. 2 in accordance with the terms of the bid.

The complainant thereupon, without any additional statement or negotiation, defaulted, and the city gave the contract to the next lowest bidder for a much larger sum than that contained in the complainant's proposals.

The bill of complaint prays for a reformation and amendment of the proposal upon contract No. 2 in respect to the two alleged errors, or for its rescission and cancellation; also, that the defendant be either required to enter into a contract for the work described in both contracts as reformed, or that the bids for the whole work be rejected. To compel the city to contract with the complainants for the whole work would be manifestly improper. The alleged error in regard to the tunnel excavation was not one of which can properly be called a mistake; it was the result of negligence. The question, therefore, is, shall the contract No. 2 be reformed or rescinded by reason of the single error. A decree for the reformation of a contract presupposes a willingness on the part of the mistaken person to execute as reformed. The history of the case, as shown in the record, makes it very doubtful whether a willingness to execute contract No. 2 existed. The complainant, it is

right to assume, honestly blundered in supposing that the contracts were to be let for the entire work, which was the result at which it was aiming both in its proposals and in its subsequent propositions. It made three kinds of mistakes. It supposed, or acted as if it supposed, that both proposals must be considered together and be accepted or be rejected. It made one clerical error in one proposal, and also an error through haste in filling out the estimates. It is impossible to say that it was ever willing to carry out that contract with or without the correction, or that its default was occasioned by the clerical error. It is as probable that it would have defaulted with a correction as without it. A rescission cuts off the city from the right to sue upon its penal bond by reason of the default of the complainants, which I think ought not to be permitted under the circumstances heretofore stated.

Supreme Court of the United States.

OCTOBER TERM, 1899.

MOFFETT, HODGKINS & CLARKE COMPANY, Petitioner, against THE CITY OF ROCHESTER, George W. Aldridge, William W. Barnard and John U. Schroth, composing the Executive Board of the City of Rochester, Respondents.	No. 217.

Petitioner's Points.

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, granted by this Court on March 6, 1899 (*173 U. S., 704*).

This suit was brought by the petitioner in the United States Circuit Court for the Northern District of New York against the respondents, The City of Rochester and the several members constituting its Executive Board, for the purpose of procuring the rescission of a bid made by the petitioner for constructing a steel-pipe conduit and appurtenances for the City of Rochester,

and to enjoin the respondents from declaring the petitioner in default with respect to such proposal, and from declaring the bond executed in its behalf forfeited, and from in any manner suing upon or attempting to enforce or collect such bond.

The grounds on which the petitioner sought relief were that, in making its proposal for this work, its engineer, who had charge of the preparation of the bid presented to the respondent, made several clerical errors, aggregating $63,800., notwithstanding which fact, which was promptly called to the respondent's attention, the latter required it to enter into a contract on the basis of the erroneous proposal, and threatened, in the event of a failure to execute such contract, to enforce the penalty of the bond delivered by the petitioner at the time of the presentation of its proposal. This bond was executed by the American Surety Company, and was for the sum of $90,000.

The respondents, in their answer, denied that any clerical errors were made, and insisted upon their right to enforce the bond in the event of the petitioner's failure to enter into a contract in accordance with its proposal.

Issue having been joined, the parties proceeded to take their proofs, and, on a trial and hearing in the United States Circuit Court held in and for the Northern District of New York before Judge ALFRED C. COXE, a decree was, on September 6, 1897, rendered by him in favor of the petitioner for the relief prayed for in the bill of complaint.

The opinion rendered on such decision is reported in *82 Federal Reporter, at page 255.*

Thereupon the respondents appealed from such decree to the United States Circuit Court of Appeals for the Second Circuit their assignment of errors appearing at pages 454 and 455 and thereafter such proceedings were had in said Court that on December 7, 1898, a decision was rendered reversing the decree of the United States Circuit Court, with costs, and with instructions to the Court below to dismiss the bill.

The argument in the United States Circuit Court of Appeals was had before Judges WALLACE, SHIPMAN and LACOMBE. Two opinions were rendered, one by Judge WALLACE and the other by Judge SHIPMAN. The opinions do not indicate whether or not Judge LACOMBE united in either of them, and the petitioner has no knowledge on that subject.

The opinion of Judge SHIPMAN, while concurring in the result reached by Judge WALLACE, expressly states that it does not concur "in all the restrictions which the opinion will be construed to place upon the power of a Court of equity either to reform or rescind contracts upon the ground of mistake."

These opinions are reported in *91 Federal Rep., at pages 28 to 37.*

Notwithstanding the reversal of the decree of the United States Circuit Court by the United States Circuit Court of Appeals, the opinions, both of Judge WALLACE and of Judge SHIPMAN, admitted that the evidence satisfactorily proves that the petitioner made at least one clerical error in inserting in its proposal figures, whereby the total amount of the petitioner's bid was $36,800. lower than it would other-

wise have been, and that the evidence also indicates that the petitioner made an erroneous estimate of the cost of certain tunnel excavations, whereby the petitioner's bid was made $27,000. less than it would otherwise have been.

Both opinions also show that the errors and misapprehensions of the petitioner in respect to its bids were honestly made, and that the petitioner called the attention of the respondents to one of these mistakes at the time of the public reading of the bids and before any action was taken by the respondents on such bid.

Judge WALLACE said in the course of his opinion (Rec., p. 458):

"The evidence satisfactorily proves that the complainant made a clerical error in inserting in the proposal for Contract No. 2, route 'B,' the price of fifty cents instead of seventy cents per cubic yard for certain earth excavations (of the estimated quantity of 184,000 cubic yards), whereby the total amount of the bid, when the various items were tabulated, was $36,800. lower than it would otherwise have been. The evidence also indicates that the complainant made an erroneous estimate of the cost of certain tunnel excavation by omitting to take into consideration certain features of the work, and, in consequence, inserted in that proposal the price of one dollar and fifty cents per cubic yard, whereas it would have otherwise inserted a price of fifteen dollars. At the estimated quantity of this excavation, the bid was $27,000. less that it would have been at fifteen dollars per cubit yard. * * * At the time of the public reading of the bids the complainant called the attention of the board to the mistake in the price for the earth excavation, but did not mention the other alleged error."

Judge SHIPMAN said (Rec., p. 468):

"The complainant, it is right to assume, honestly blundered in supposing that the contracts were to be let for the entire work, which was the result at which it was aiming both in its proposals and in its subsequent propositions. It made three kinds of mistakes. It supposed, or acted as if it supposed, that both proposals must be considered together and be accepted or be rejected. It made one clerical error in one proposal, and also an error through haste in filling out the estimates."

Judge COXE, speaking of the testimony and of the concessions of respondents' counsel says, Rec., pages 447, 448:

"By a mistake of Mr. Burlingame, its engineer, the complainant bid fifty cents per cubic yard for earth excavation in open trenches when it intended to bid 70 cents, and $1.50 for earth excavation in tunnel when it intended to bid $15. *The proof of these mistakes is clear, explicit and undisputed.* As soon as the item proposing to do the work for 50 cents, as aforesaid, was read at the meeting of the executive board, and before any action was taken thereon, Mr. Burlingame stated that it was an error, and that complainant intended to bid for route B the same as for route A, viz., 70 cents. There is some testimony of a negative character that this prompt repudiation of the bid did not take place, but the great weight of testimony is in favor of the complainant. Had the errors been corrected, the complainant's bid would still have been $200,000. below the next lowest bid. On route A the complainant's bid was $903,324. The mistakes all occurred on route B, and yet route A was selected and the work awarded to other bidders for $1,123,920., or $220,596. more than the complainant's proposal."

"Upon the principal issue there is no disputed question of fact. Counsel for the defendants, though not admitting the mistakes, which are the basis of the action, *do not dispute them.* The oral argument proceeded upon the theory that the mistakes were made precisely as alleged. In order that no injustice may be done to the defendants, their position in this regard is stated in the language of their brief as follows:

"*We admit that the evidence of the complainant shows that Mr. Burlingame entered in his proposal sheets certain figures and numbers different from those which he intended to make, and that the defendants have no evidence to contradict this testimony.*"

While the Circuit Court has held these errors sufficient to warrant a Court of equity to decree a cancellation of the bid, the United States Circuit Court of Appeals has decided that a Court of equity has no power to relieve the petitioner from the consequences of its mistake, because such mistake was not mutual, but unilateral, and that a Court of equity will not rescind a contract merely for the mistake of one party, and has likewise held that there is no sound reason and no well considered authority for the proposition that, although a Court of equity will not reform a contract except for the mistake of both parties, it will rescind one merely for the mistake of one party.

The facts as established by the testimony, as practically admitted by the respondents' counsel on the hearing in the Court of first instance and as found by the Court are substantially as follows:

1. In December, 1892, the Executive Board of the City of Rochester determined to construct a

new pipe line for the purposes of a water supply for the city, leading from Hemlock Lake to the City of Rochester.

The work was divided into two sections. The first consisted of a masonry water conduit, tunnel and gate house, commencing at the northwest corner of Hemlock Lake and terminating at a point on the outlet of the lake about 12,000 feet northerly. This work was embodied in what is known as Contract No. 1.

The second section of the work began at the north end of the masonry conduit and terminated at Mt. Hope Reservoir, in the City of Rochester, and involved the laying of a steel pipe about 140,000 feet in length. This work was embodied in what is known as Contract No. 2.

2. The specifications of contract No. 2 provided for two routes, known respectively as "A" and "B." The first of these was located in the alluvial flats through which Honeoye Creek meanders, and involved several crossings of the existing and former channels of the creek. The second was located wholly on the west of Honeoye Creek, and avoided the crossings by following the course of a lateral valley for some distance, and then returning to the west bank of the creek by means of a masonry conduit and tunnel about 1,000 feet long. These two routes were in all respects identical, with the exception of about 8,000 feet of the entire distance of 140,000 feet, and the quantity of work called for by the specifications relating to the two routes was substantially identical.

3. In addition to inviting proposals for these

two contracts, the respondents concurrently advertised for bids for furnishing cast-iron pipe instead of riveted steel pipe, the contracts relative to such cast-iron pipe being known as contracts Nos. 3 and 4.

4. The specification for the work required under these four contracts, together with diagrams exhibiting the limits of excavation and masonry, were prepared by the engineer of the Executive Board with great care and particularity. Those relating to contract No. 1 covered 110 closely printed pages (*Record, pp. 328 to 438*). Those relating to contract No. 2 covered 184 printed pages (*Record, pp. 94 to 278*). Those relating to contracts Nos. 3 and 4 were also voluminous. Many months were devoted by the respondents' engineers in the preparation and elaboration of these specifications (*Rec.*, p. 284).

5. In December, 1892, advertisements were inserted in various newspapers directed to contractors calling for bids or proposals for the work specified in the four contracts, bidders being required to present their proposals on December 23d, 1892. It was insisted that all bids should be made out on the printed forms of proposal furnished by the board, and that the bond attached to each form of proposal should be properly executed. Notice was given that blank forms of proposal, contracts and specifications might be seen at the office of the board on and after December 10, 1892.

This was done pursuant to Sect. 172 of the Charter of the City of Rochester (Laws of 1890, Ch. 567, p. 28), which reads as follows:

"The Executive Board is hereby directed to cause a notice to be published in one or more of the daily newspapers of said city, at least ten days before the letting of any contract, for sealed proposals therefor, each to be accompanied by a bond signed by at least two responsible sureties, conditioned that the person, firm or corporation making such bid, if it is accepted, will perform the work or furnish the materials, or both, mentioned in such proposals, and fulfil any contract that may be made with him, them or it, and the amount specified in the bond shall be recoverable thereon in case the proposer fails to perform the conditions of the bond and its accompanying proposal; such bids shall be opened on the day named in such notice. Said board may let any contracts as it deems for the best interests of taxpayers, but it shall publish all bids received by it, and the persons, firms or corporations to whom contracts are awarded. Such contracts shall be enforceable by and in the name of the City of Rochester, or said Executive Board as such. Neither the principal or sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made, and the same shall have been duly executed."

6. The petitioner was engaged in constructing water plants, railroads and other public works in various parts of the country, and had its principal offices in the City of New York. Mr. John F. Moffett was its president, his special duties being to procure franchises and contracts for the company. Mr. John V. Clarke was the treasurer, whose duties were confined to the company's financial affairs, and Mr. Henry C. Hodgkins had charge of the engineering department, having under him a staff of civil

and hydraulic engineers who did their work under his supervision, and referred to him all matters pertaining to the preparation of bids and questions of construction (*Rec.*, p. 17). Unfortunately, Mr. Hodgkins was disabled from doing any active work during the latter part of 1892, in consequence of an attack of typhoid fever (*Rec.*, *pp.* 20, 62, 63).

7. About December 10, 1892, the petitioner observed in the "Engineering News" the respondents' advertisements for bids, and thereupon Mr. Edwin H. Burlingame, who was the principal subordinate under Mr. Hodgkins, a man of mature years, who had had 37 years of experience in important public works, was detailed, in the absence of Mr. Hodgkins, to proceed to Rochester for the purpose of familiarizing himself with the situation and of preparing a proposal on the work. Mr. Moffett also expected to proceed to Rochester (*Rec. pp.* 16, 17, 26).

8. Copies of the specifications reached Mr. Burlingame about a week prior to the time fixed for the presentation of bids. Before proceeding to Rochester he was obliged to go to Gouverneur, in order to inspect railroad work there in progress, and finally reached Rochester on Monday morning preceding the Friday on which the bids were to be submitted (*Rec.*, pp. 19, 20, 26). On Monday he met Mr. Kuichling, the respondents' engineer, with whom he examined the plans, and obtained various data relative to the work, of which he had no knowledge until that time (*Rec.*, pp. 22, 23). On Tuesday he

went over the line of the proposed conduit, walking most of the way, studying the topography and familiarizing himself with the locality (*Rec.*, pp. 24). On Wednesday he conferred with various residents of Rochester as to the prices of labor and material, and with the representatives of manufacturers of pipe, which involved complicated calculations (*Rec.*, pp. 24, 25). These investigations also occupied the greater part of Thursday, during which time he made various memoranda, which served as the basis of the prices which he subsequently proposed to insert in the pamphlet furnished by the respondents (*Rec.*, pp. 25, 26). The memoranda thus made were voluminous, and required careful collation.

9. It was expected that Mr. Moffett would proceed to Rochester with pamphlets furnished by the respondents, which would contain the bonds which the latter required as an accompaniment to the bids presented, fully executed. Business delayed Mr. Moffett at Boston so that he was unable to leave New York until Thursday evening, and the train which he took was delayed so that he did not in fact reach Rochester until after 10 o'clock Friday morning. Thereupon, Mr. Burlingame found that there was only one way in which to have his bid ready by the time designated in the advertisement, and that was to procure a new set of blank proposals, and to fill the prices bid into such blanks. This he proceeded to do, and was thus engaged when Mr. Moffett arrived. It was impossible for them to have any conference, and it was decided to submit the pamphlets containing the bonds and those containing the prices

filled by Mr. Burlingame (*Rec.*, *pp.* 26, 27). Mr. Burlingame, by reason of the enormous amount of labor which was imposed upon him, the haste and excitement incident thereto, the absence of Mr. Hodgkins, and the uneasiness attendant upon this unwonted responsibility, became nervous and confused, and with this nervousness came an affection of his eyes which increased the confusion (*Rec.*, pp. 28, 29).

10. The specifications of Contract No. 1 contained 182 paragraphs; those of Contract No. 2 contained 326 paragraphs (Rec., pp. 25, 26). The items and quantities of work involved in bidding on Route "A" of Contract No. 2 were 61 in number; those relating to Route "B" on Contract No. 2 were 75 in number, and those relating to Contract No. 1 were 44 in number (*Rec.*, p. 23).

11. The pamphlets furnished by the defendants contained a statement of the items and quantities of work according to the estimate of the respondent's engineer. In Contract No. 2 the estimates of the work on Route "A" and Route "B" respectively, are substantially identical.

In both, item "*d*," which related to earth excavation in open trenches, was as follows:

"(*d*) One hundred and eighty-four thousand (184,000) cubic yards earth excavation in open trenches or pits for the conduit, gate-vaults, blow-offs, over-flows, bridges, railroad crossings, creek crossings and culverts."

Rec., Exhibit 1–A, p. 98.

12. The specifications relative to this work on Routes "A" and "B" were also identical, and are as follows:

"(*d*) For all earth excavations in open trenches or pits for the masonry and pipe conduits, entrance and overflow chambers, blow-offs, overflows, bridges, railroad crossings, creek crossings and culverts, carried under said conduit, including bracing and sheeting, back-filling of trenches and masonry, making embankments and other final disposal of the excavated material, with haul of 1,000 feet or less, bailings and draining, and other work incidental thereto, the sum of
per cubic yard."

Rec., p. 108.

13. When Mr. Burlingame came to fill in this blank "*d*" for Route A in Contract No. 2 he at first inserted as the price 50 cents per cubic yard; discovering that this was an error, he changed the price to 70 cents per cubic yard. When he reached this item in the contract for Route B he inserted 50 cents as the price and omitted to make the correction (*Rec., pp.* 28, 29). It was his intention to charge for this work 70 cents per cubic yard, that being the fair market value of the work (*Rec., p.* 28). There was no intention on his part to make any difference in the price bid for earth excavation under subdivision "*d*" of Routes A and B, respectively (*Rec., pp.* 28, 29). His explanation of making these errors was:

"I was overcome very much with it and nervous over the delay about the matter, and also the trouble which I had in getting things together; Mr. Moffett's slowness in appearing. The magni-

tude of the work seemed to me that it demanded more time than I had to make bids in, and I was in that condition that I was not fit to make a bid."

"Q. Was your mind confused? A. Yes, sir. I don't like to acknowledge it; in the haste to finish it up, knowing that there was danger in not getting to the room in time, and the general confusion in which the thing was, I was not fit to make the bid.

"Q. What do you mean by saying you were not fit to make the bid? A. Well, I was in a nervous condition; that is all."

Rec., p. 29.

It was his purpose to bid 70 cents, and his bid of a lesser amount for route B was entirely unintentional.

14. On route B there was also an item for earth excavation in tunnel. It was Mr. Burlingame's purpose to bid $15. per cubic yard for this work. His bid, as he entered it in the blank, was $1.50 per cubic yard. He carried out $1 50 without considering anything except the mere moving of the earth. There was no sense or reason in a bid of $1.50, as the fair price under ordinary conditions, and without considering contingencies, was from $8. to $10. per cubic yard. It is not pretended by any of the respondents' experts that this tunneling could have been done for any sum approaching the amount bid by the petitioner.

Record, pp. 30, 31.

15. The time for presentation of bids arrived before Mr. Burlingame had an opportunity of check-

ing or comparing his work, and the papers were hastily bundled into one package and handed to the Clerk of the Executive Board shortly after the hour fixed for the presentation of bids (*Record*, *pp.* 27, 30, 31).

The bids on contract No. 1 were opened first, and an objection was made by one of the board as to the shape in which the petitioner's bid was submitted, it being regarded as informal (*Rec.*, *pp.* 31, 32). They were nevertheless read.

When the bids on contract No. 2 were opened, that of the petitioner's was first (*Rec.*, *p.* 32). As soon as the clerk of the board read item "*d*" relating to route B, Mr. Burlingame immediately interrupted the clerk and said that, if the proposal read 50 cents per cubic yard, it was a mistake, and that it was intended to charge the same price as was specified in route A, namely, 70 cents per cubic yard (*Rec.*, *p.* 32).

Mr. Burlingame is corroborated on this point by John E. Porter, who was present representing other bidders (*Rec.*, *pp.* 81 to 83).

Mr. Moffett did not remain until the bids were read, business requiring him to leave on an early train.

Rec., *pp.* 66, 67.

16. Although the three members of the Executive Board were present, neither of them was sworn on behalf of the respondents to contradict this testimony, although their attention was specifically called to the claim that Mr. Burlingame attempted to make this correction by a communication presented to the re-

spondents on January 11, 1893 (*Rec.*, *pp.* 86, 87), and by the allegations of the bill of complaint (*Rec.*, *p.* 6). Neither did Mr. Kuichling, the engineer, who was present, contradict Mr. Burlingame's statement.

The bids presented for constructing a 38-inch conduit on Route A aggregated as follows:

Moffett, Hodgkins & Clarke Company	$903,324 00
Whitmore, Rauber & Vicinus	1,123,920 00
Carroll-Porter Company	1,208,002 00
Rochester Construction Company...	1,331,885 00

Rec., *p.* 32.

The aggregate of the bids for constructing 38-inch conduit on Route B were as follows:

Moffett, Hodgkins & Clarke Company	$857,552 50
Whitmore, Rauber & Vicinus	1,130,195 00
Carroll-Porter Company.....	1,215,382 00
Rochester Construction Company ...	1,349,935 00

Rec., *pp.* 32, 33.

18. On each route the following bids were made for earth excavation in trench by bidders other than the petitioner:

	Per Cubic Yard.
Whitmore, Rauber & Vicinus.....	75 cents.
Carroll-Porter Company.....	85 "
Rochester Construction Company.....	80 "

Rec., p. 33.

The bids made for the earth excavation in tunnel by each bidder other than the petitioner were as follows:

	Per Cubic Yard.
Whitmore, Rauber & Vicinus	$15
Carroll-Porter Company	12
Rochester Construction Company	12

Rec., p. 33.

19. The difference in the earth excavation required by the contract, between the figure 50 cents per cubic yard and 70 cents per cubic yard, was $36,800., and the difference in the earth excavation in tunnel indicated by the specifications between the price of $1.50 and $15. per cubic yard was $27,000., making an aggregate of $63,800, representing the errors of the petitioner's engineer in filling out the blanks in the proposal submitted by him (*Rec.*, pp. 33, 34). The testimony of Mr. Burlingame, Mr. Moffett and Mr. Porter shows that it would have been impossible to do the work represented by the items in which the errors occurred for anything like the sum named in the proposal.

20. Notwithstanding the attempt of the petitioner to correct the errors of Mr. Burlingame, and the communication addressed to the respondents' Executive Board (*Rec.*, pp. 86, 87, 88), a resolution was adopted on January 12, 1893, accepting the petitioner's proposal for the construction of the 38-inch riveted steel-pipe conduit on Route B, and notice was given requiring the petitioner to attend at the office of the board, with sureties, on or before January 19th, 1893, to execute at that time a contract for the execution of the work (*Rec.*, p. 10)

21. On January 18th, 1893, a temporary injunction was issued in this action restraining the respondents from declaring the petitioner in default; from declaring its bond forfeited, and from in any manner suing thereon (*Rec.*, pp. 88, 89). This injunction was laid before the meeting of the Executive Board on January 20th, 1893, whereupon the contract was awarded to Whitmore, Rauber & Vicinus for the construction of the conduit by Route A (*Rec.*, pp. 60, 61). This contract was duly entered into (*Rec.*, pp. 61, 62), and the work was commenced in March, 1893, and completed in November, 1894 (*Rec.*, p. 288).

22. It is to be observed that the contract awarded to the Moffett, Hodgkins & Clarke Company upon Route B, in respect to which the errors in question had occurred, was at the price of $857,552.50; and that their proposal for constructing Route A, where the errors did not occur, was $903,324. Yet the work was finally awarded to Whitmore, Rauber & Vicinus, on Route A, at $1,123,920.

The questions of law which are suggested by these facts are of serious importance, and present a subject of great moment in that domain of equity jurisprudence which relates to mistake and rescission.

The two Courts which have thus far passed upon this case are divided in opinion as to the very existence of a principle which is asserted by one of the Courts and denied by the other.

The following grounds of error are predicated upon the decision of the United States Circuit Court of Appeals:

(*a*) While that Court has practically determined that a Court of equity cannot relieve against the consequences of a conceded clerical error of the most substantial character, made in a proposal for public work, where the mistake is, as it must always be, unilateral, it is believed that such conclusion is in direct contravention to a long line of well-considered cases.

(*b*) It is likewise believed that the United States Circuit Court of Appeals has either disregarded or misconstrued a number of authorities of controlling importance, of which the following are illustrations:

2 Pomeroy on Equity Jurisprudence, Section 870.
Adams, Equity, Section 171.
Smith vs. Mackin 4 Lansing, 41.
Rider vs. Powell, 28 N. Y., 310, 316.
Jackson vs. Andrews, 59 N. Y., 244.
Crowe vs. Lewin, 95 N. Y., 423.
Bradford vs. Union Bank, 13 How., 68.
Griswold vs. Hazard, 141 U. S., 260.
Webster vs. Cecil, 30 Beavan, 62.
Hartford & N. H. R. Co. vs. Jackson, 24 Conn., 513.
Rowland vs. N. Y. & N. H. R. R. Co., 61 Conn., 103.
Mummenhoff vs. Randall, 19 Ind., App., 44.
Rupley vs. Daggett, 74 Ill., 351.
Diman vs. Providence W. & B. R. Co., 5 R. I., 130.

Dulany vs. Rogers, 50 Md., 533.
Hearne vs. Insurance Company, 20 Wall., 491.

(*c*) Moreover, it is believed that the United States Circuit Court of Appeals, in the rendition of its decision, overlooked the importance of the fundamental rule that in order to constitute a valid contract there must be an actual meeting of the minds of the parties, and that under the circumstances disclosed by the conceded facts the petitioner never intended to make the proposal which it seeks to have rescinded, but intended to make an entirely different proposal.

(*d*) The United States Circuit Court of Appeals has likewise omitted to give any consideration whatever to the conceded fact that, although the respondents were enjoined by the petitioner before the time fixed for the execution of a contract in conformity with its proposal from declaring it in default, the respondents entered into a contract with Whitmore, Rauber and Vicinus, which has been fully performed, for doing the very work on which the petitioner made its bid.

The petitioner claims that the respondents' acts have rendered performance by it of any proposal made impossible, and that under the circumstances the respondents should be enjoined from seeking to impose a forfeiture on the petitioner, and from enforcing the bond of the American Surety Company, under the decisions of which the following are illustrations:

United States vs. Peck, 102 U. S., 64;

Shaw vs. Republic Life Ins. Co., 69 N. Y., 285, 293;
Mansfield vs N. Y. C. & H. R. R. Co., 102 N. Y., 211;
Bogardus vs. N. Y. Life Ins. Co., 101 N. Y., 328;
Taylor vs. Risley, 28 Hun, 144.

POINTS.

I.

A Court of equity has the power to relieve a party against the consequences of a clerical error by the remedy of cancellation and rescission, although such error was unilateral, and fraud cannot be predicated of any act of the other party.

Judge COXE recognized, as a principle of equity, that:

"Cancellation is proper where there is an apparently valid written agreement or transaction embodied in writing, while in fact by reason of a mistake by both or one of the parties, either no agreement at all has really been made, since the minds of both parties have failed to meet upon the same matters; or else the agreement or transaction is different with respect to its subject matter or terms, from that which was intended."

Judge WALLACE, on the other hand, referring to this ruling, says:

"The Court below adopted the opinion which has been some times expressed *obiter* by judges, and frequently quoted by text writers, that equity will not reform a written contract unless for the mistake of both parties, but may rescind and cancel one upon the ground of a mistake by either.

* * * * * *

"A very extended examination of the reports has failed to disclose a case in which a judgment rescinding a contract has proceeded solely upon the ground that the terms as reduced to writing, although expressing the understanding of one party did not express that of the other. In all the reported cases where there was not the element of mutual mistake, or mistake of one side with knowledge on the other, there was, in the language of Addison, 'some undue influence, misrepresentation, surprise or abuse of confidence,' or the contract was so oppressive as to be unconscionable."

These quotations present in contrasted form the variances between the two Courts which have thus far passed upon this case.

It will prove useful to call attention to a number of authorities which support the proposition as declared by the Circuit Court, and which, it is believed, have either been overlooked or misconceived by the United States Circuit Court of Appeals.

The rule as announced by Judge COXE was formulated by *Prof. Pomeroy*, in *Volume 2, Sec. 870*, of his most excellent work on *Equity Jurisprudence*, and as the result of a thorough and scholarly analysis of numerous decisions, both of the English and American Courts.

He recognizes that there is a manifest distinction between a mistake calling for cancellation, and one calling for reformation.

It is clear that where one party only has made a mistake, and the other has been guilty of no fraud and has not contributed to the mistake, or was not cognizant of it, reformation is inappropriate. To reform an instrument under these circumstances, so as to change its provisions, is to make a contract for the parties which they did not themselves make and which one of them never intended to make. In other words, by reforming an instrument in such a case, the Court would attempt to create a meeting of the minds which never took place.

On the other hand, however, where one of the parties does not intend to enter into a contract or written transaction in the form embodied in the written instrument, or by reason of a clerical error or other mistake, his pen declares what his mind did not intend, there has been no meeting of the minds however innocent the other party to the instrument may be of fraud, mistake, undue influence or abuse of confidence.

In such a case it would be manifestly unjust to hold a party to an agreement which he never in fact made, and to declare his written word irrevocably binding, however injurious the consequences and however remote from his real purpose and intention.

Unless this were so most astounding and ruinous consequences might result from clerical errors or innocent mistakes, which are of common occurrence in the experience of every business man.

Thus, if A should offer to sell property worth $10,000. to B for $1,000., when he really intended to offer it at $10,000., and B, in ignorance of A's true intention, should accept the proposition, A, under the rule announced by the United States Circuit Court of Appeals would have no remedy.

Or, if A, intending to sell Blackacre for $10,000., should, by mistake, offer Whiteacre, which is worth $15,000., and B should, without fraud, accept the proposition, according to the same view, no relief could be had.

Or, taking the present case for illustration: It is conceded that the petitioner intended to bid 70 cents per cubic yard for earth excavation. By a mistake, which was purely clerical, 50 cents only were charged in the written proposal, but before the acceptance of it, and instantly upon discovering the mistake, it was sought to be rectified. Under the decision of the Circuit Court of Appeals, the petitioner is held irrevocably bound by this bid, although, concededly, it did not express what was intended.

If the rule laid down by the Circuit Court of Appeals is sound, then the same result would have followed if, instead of bidding 50 cents, the petitioner had offered to do the work for ten cents per cubic yard.

There is something so shocking to one's sense of justice in a system of jurisprudence which would tolerate such consequences that a mere generalization as to what has or has not been decided in adjudged cases is not sufficient to convince the mind of the existence of such a doctrine; but a more careful examination of the authorities is essential.

In *15 Am. and Eng. Encyl. of Law, title* "Mistake," *page 647*, the doctrine for which we contend is formulated in the following language:

"Equity will not *reform* a written instrument unless the mistake is proven to be the mistake of both parties, but may *rescind and cancel* a contract upon the ground of mistake of facts material to the contract of one party only."

In *Adams' Equity, Section 171*, the doctrine is thus expressed:

"A mistake on one side may be a ground for rescinding a contract or for refusing to enforce its specific performance, but it would not be a ground for altering its terms."

In *Rider vs. Powell, 28 N. Y, 310*, the action was one for the reformation of a mortgage. The majority of the Court of Appeals affirmed a decision permitting such reformation. Some of the Judges dissented because there was no proof of a mistake or fraud on the part of the defendant, although there was proof of a mistake on the part of the plaintiff. Yet, in their dissenting opinion, they recognized the principle for which we contend, Judge WRIGHT saying:

"I suppose the rule to be that when there is a mistake on one side, and that a material mistake, it may be a ground for rescinding a contract or for refusing to enforce its specific performance, but not a ground for altering its terms. A mistake by the plaintiff when he made the contract, as to the interest he was to receive on the bond and mortgage, would not entitle him to have the contract so modified as to conform to his mistaken impression, although it might be a reason for rescinding the contract on the ground that the minds of the parties never met in making it."

Again he says:

"This distinction has been sometimes overlooked in the application of the general rule, and some confusion and uncertainty thereby created, but it stands upon sound reason, and is inherent in the very nature of the different remedies. As there is no doubt as to the plaintiff's mistake and the mistake of his attorney, nor that it was most material, the plaintiff is entitled to the relief granted on that ground alone."

In *Smith vs. Mackin, 4 Lansing, 41*, Mr. Justice JOHNSON treats of the proposition with great clearness as follows:

"It is one of the cardinal rules of equity that an act done or a contract made under a mistake, or in ignorance of a material fact, is voidable and relievable in equity (*Story's Equity, Sec. 140*). That the mistake here was in regard to a most material fact cannot be denied. The defendant knew how the fact was at the time the contract was made, and was also aware of the plaintiff's misapprehension in regard to it. It is claimed that, inasmuch as there was no mistake on the part of the defendant, the plaintiff cannot have relief on that ground; that, to entitle a party to relief on that ground, the mistake must be mutual. In cases where the relief sought was the reformation of the contract, it has been held, and the general rule undoubtedly is, that, to entitle a party to that species of relief, the mistake must be mutual. And there is good reason for this. The object of a reformation is to make the terms of the contract express what the parties intended it should express; in other words, to express the minds of the parties as they met upon the subject matter. If the minds of the parties did not meet, and one understood the matter as expressed in the agreement, and the other differently, there can be no reformation, in the nature

of things, because nothing was agreed upon in the minds of the parties. Their minds never met; and the Court, instead of reforming a contract, would make a new one altogether, which both parties never intended to make, should it attempt to alter and reform in such a case.

"But I understand the rule to be quite different when the relief sought is the rescission of the contract altogether. This goes upon the ground of relieving any party who has become bound by a contract which he never intended to make, and never would have made, but for a mistake he was laboring under in regard to a material fact. The rule is thus laid down in *Adams' Equity, 171:* 'A mistake on one side may be a ground for rescinding a contract, or for refusing to enforce its specific performance; but it cannot be a ground for altering its terms.' This is recognized as the true rule by WRIGHT, J., in his dissenting opinion in *Rider vs. Powell (28 N. Y., 310, 316).* This distinction has been sometimes overlooked by Courts in the application of the general rule, and some confusion and uncertainty thereby created. But it stands upon sound reason, and is inherent in the very nature of the different remedies. As there is no manner of doubt as to the plaintiff's mistake and the mistake of his attorney, nor that it was most material, the plaintiff is entitled to the relief granted on that ground alone."

In *Jackson vs. Andrews, 59 N. Y., 244,* Judge GROVER said:

"To entitle the plaintiff to a reformation of the contract he must prove that it was the intention of both parties to make a contract such as he sought to have established, and that this intention was frustrated either from some fraud, accident or the mutual mistake of the parties. It was not enough for him to show his own intention. He must further show that the sense and intention of the

defendant concurred therein. He must prove that both parties understood the contract as he alleges it ought to have been, and, in fact, would have been but for the fraud or mistake.

* * * * * *

"Had it appeared that there was a mutual misunderstanding of the parties in these respects—that, in fact, they had never agreed upon its terms—and the plaintiff had sought to have it canceled upon this ground, and to be restored to his former rights, the question would have been different. But no such relief was sought or asked for by the plaintiff in the action."

In *Crowe vs. Lewin, 95 N. Y., 423* (see also *Erratum, 96 N. Y.*), Judge FINCH said:

"In this case the minds of the parties never met. The contract in form was not a contract in fact. It originated in mistake, and that mistake *not mutual* and about the same thing, but different on the part of each. Taking the findings as our guide, it appears that the plaintiff agreed to exchange his house and lot for four lots at Williams Bridge, which the defendants represented that they owned and would convey. As matter of fact they did not own them, but did own a triangular parcel in the neighborhood fronting on the Bronx River, but of trifling value and much inferior area, which they say was what they intended to convey, but by mistake the four lots at Williams Bridge were substituted in the deed they gave." * * *

"On the ground of their mistake, the defendants, who stood liable on the covenants of their deed, asked to reform that instrument by substituting in it the Bronx River lots. But that relief would impose a new contract on plaintiff which he never made, and to which he is not bound to accede. The action of equity in reforming a contract is to make it speak for the minds of the

parties, but here the defendants' effort is to make it speak the mind of one but not of the other. The mistake should be corrected, but it can only be done by a rescission of the formal contract, and a restoration to each of what has been parted with on its faith."

In *Dulany vs. Rogers, 50 Md., 533*, it is said:

"A mistake on one side may be ground for *rescinding*, but not for *reforming*, a written agreement."

In *Diman vs. Providence, W. & B. R. Co., 5 R. I., 130*, Chief Justice AMES said:

"A Court of equity has no power to alter or reform an agreement made between parties, since this would be in truth a power to contract for them; but merely to correct the writing executed as evidence of the agreement, so as to make it express what the parties actually agreed to. It follows that the mistake which it may correct in such writing must be, as it is usually expressed, the mistake of *both* parties to it; that is, such a mistake in the drafting of the writing as makes it convey the intent or meaning of neither party to the contract."

The opinion, however, recognizes the fact that while equity will not reform a written contract unless the mistake is proved to be the mistake of both parties, it may rescind and cancel a contract upon the ground of a mistake of facts material to the contract by one party only.

In *Griswold vs. Hazard, 141 U. S., 260*, the plaintiff executed a bond in *ne exeat* proceedings against one Durant, conditioned that the latter should "abide and perform the orders and decrees" of the Court. The bond was exe-

cuted by the plaintiff upon the understanding that the obligation in law assumed by him by its execution, was to subject him to liability for the penal sum named, only in the event that the principal failed to appear and become subject to the order and decrees of the Court.

Durant having died, a decree was rendered perpetually enjoining any action, suit or proceeding to make the plaintiff liable in any sum whatever, by reason of the execution of the bond on the mistake of Griswold alone.

In *Hearne vs. Marine Insurance Company, 20 Wall., 488, 490*, Mr. Justice SWAYNE, speaking for a unanimous Court said:

"The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred."

"The party alleging the mistake must show exactly in what it consists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the Court as to either of these points. The mistake must be mutual and common to both parties to the instrument. *It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met there is no contract, and, hence, none to be rectified.*"

In support of the proposition that a unilateral mistake may be ground for rescission, Mr. Justice SWAYNE cited *Mortimer vs. Shortall, 2 Drury & Warren, 372.*

This decision, which is by no less an authority than Lord SUGDEN, is attacked by Judge WALLACE, in his opinion in this case, as being neither lucid nor logical. But it is believed that a mere phrase is insufficient to obliterate and overrule authorities of the importance of those which have been cited, in which the principle for which we contend is recognized as an existing one.

It is apparent, from each of these authorities, that the real ground for recognizing the right of cancellation and rescission in the case of unilateral mistake was that the fundamental test of a contract was not present, viz, a meeting of the minds of the parties, or, as it is expressed in *Anson on Contracts, Sections 122 to 136*, an "identity of ideation."

Hence, a Court of equity which is not limited to mere forms of expression, but which regards the true intent of litigants, has, for the purpose of preventing injustice, undertaken to undo that which was induced by the mistake of one of the parts, to the end that no advantage may be taken by the other of such mistake.

In his opinion Judge WALLACE seeks to distinguish a number of the cases to which we have referred by the suggestion that each of them involved a mistake by one of the contracting parties, and unconscionable conduct on the part of the other. An examination of the cases, however, discloses the fact that in the rendition of their

judgment, so far as they recognize the existence of the principle which we are invoking, the Courts did not lay stress on the circumstances to which Judge WALLACE referred.

Thus, in *Smith vs. Mackin* (*supra*), the Court planted its decision upon two independent grounds, the first of which was that there was a mistake on the part of the plaintiff, and none on the part of the defendant, and that, nevertheless, equity would grant relief in the form of a cancellation of the alleged contract. As an additional reason for the decision rendered the Court adverted to circumstances which would have supported the contention that the conduct of the defendants, in seeking to take advantage of the plaintiff's error, was inequitable.

So, in *Rider vs. Powell* (*28 N. Y., 310*) the Judges who asserted the right of rescission gave no weight to any facts indicating that the defendant acted unconscionably. As a matter of fact, the Court below had found that there was no proof of mistake or fraud on the part of the defendant.

The criticism of *Jackson vs. Andrews*, *59 N. Y., 244*, does not meet the proposition for which he have cited that authority.

The only relief sought was reformation, and that was denied because it was not shown that there was mutual mistake. It was not enough for the plaintiff to show that he never agreed to the terms of the contract, in order to entitle him to a reformation. The Court clearly decided, however, that upon those facts he would have been entitled to a cancellation of the contract, had he sought that species of relief.

The decision in *Griswold vs. Hazard, 141 U. S., 260*, is also sought to be distinguished on the theory that there was fraud on the part of the defendant.

Yet the real ground of the decision is indicated by the language of Mr. Justice HARLAN, on page 284, where he says:

"While it is laid down that 'a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts,' yet 'the rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of Courts of equity, resting on discretion and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best-considered and best reasoned cases upon this point, both English and American.'"

That the Court rested its decision upon this proposition solely is indicated by the language on page 286, where Mr. Justice HARLAN says:

"*But we do not rest our decision upon any ground of fraud in law or fraud in fact. We acquit the attorneys of Hazard of any desire or purpose to do injustice to Griswold, or to commit a fraud upon him.*"

While thus combating the cases which we have cited in support of our proposition, the learned Court does not cite a single case which attacks the soundness of that proposition, or which declares that a unilateral mistake clearly established and material in its character, does not afford ample ground for equitable intervention.

But, even taking the view of Judge WALLACE

that, in addition to proving the existence of a mistake by one party, it is necessary to establish fraud or unconscionable conduct by the other in order to procure a rescission or cancellation, the record fully discloses such conduct on the part of the defendants as would bring this case within the qualified rule suggested by the Court.

The conceded facts are that, in making its proposal for the construction of Route B, designated in Contract No. 2, Burlingame the petitioner's engineer, made several errors aggregating $63,800. One of these errors, at least, was a clerical error, and consisted in erroneously charging 50 cents per yard of earth excavation instead of 70 cents yer pard as intended.

These errors were real, and not the result of an afterthought. They were unintentional. They are substantial and material. There could have been no possible motive which would have induced the petitioner to make the bid which he did. It intended to do one thing but proposed to do another.

This is demonstrated by the fact that, instantly upon the reading of the bid, Burlingame called attention to the clerical error with respect to the earth excavation. This is conceded, and this concession disposes of any possible question which might arise as to the sufficiency of the proof establishing the occurrence of the clerical error.

Notwithstanding the fact that the defendants were at once informed of the mistake before any action was taken by them, before the bids were read, before they in any way altered their position; notwithstanding the fact that before any

attempt was made by the defendants to accept the proposal, the petitioner sought to be relieved from the consequences of the mistake, and asked for leave to withdraw its proposal, the defendants, with full knowledge of the mistake, and of the petitioner's attempt to correct it. refused to allow a withdrawal of the bid, and insisted upon taking advantage of the errors thus committed.

A comparison of the petitioner's bid with those of the other bidders for the work, and a consideration of the discrepancies between the petitioner's bid and the others that were made, is in itself a demonstration that the determined effort of the defendants to take the benefit of the petitioner's mistake is an attempt on their part to take such an undue advantage of this blunder as to constitute unconscionable conduct.

This is emphasized by the fact that although the petitioner's mistakes all related to Route B, and did not occur in its bid for Route A, yet the defendants undertook to award the contract to the petitioner on Route B, where the aggregate bid was $857,552.50, and disregarded Route A, as to which the petitioner's bid was $903,324. Within a month thereafter, and while the defendants were under an injunction restraining them from defaulting the petitioner, they awarded the tract on Route A, to Whitmore, Rauber & Vicinus at the sum of $1,123,920. although the bid of that firm on Route B was only $1,130,195. In other words, it was evidently the studied purpose of the defendants to force the petitioner into a contract on Route B, with full knowledge of its mistake; to impose upon it a forfeiture of $90,000. in the event

of its failure to enter in such a contract; to pass over its bid on Route A of $903,324. and to award the contract to residents of the City of Rochester at a sum $220,000. in excess of the bid made by the petitioner, in which no errors occurred; evidently seeking to justify their course to the community by making reprisals on the bond given by a foreign corporation.

If Judge WALLACE correctly characterized the conduct of the defendants in the cases which he seeks to distinguish as unconscionable, what is to be said of this action?

It must not for a moment be conceived that any doubt exists as to the facts which have been here recited and as to the defendants' practical concession of them.

In his opinion, Judge COXE says:

"Upon the principal issue there is no disputed question of fact. Counsel for the defendants, though not admitting the mistakes which are the basis of the action, do not dispute them. The oral argument proceeded upon the theory that the mistakes were made precisely as alleged. In order that no injustice may be done to the defendants, their position in this regard is stated in the language of their brief as follows: 'We admit that the evidence of the complainant shows that Mr. Burlingame entered in his proposal sheets certain figures or prices different from those which he intended to make and that the defendants have no evidence to contradict his testimony.'"

Judge WALLACE said:

"The evidence satisfactorily proves that the complainant made a clerical error in inserting in

the proposal for contract No. 2, Route 'B,' the price of fifty cents instead of seventy cents per cubic yard for certain earth excavations (of the estimated quantity of 184,000 cubic yards), whereby the total amount of the bid, when the various items were tabulated, was $36,800. lower than it would otherwise have been. The evidence also indicates that the complainant made an erroneous estimate of the cost of certain tunnel excavation by omitting to take into consideration certain features of the work, and in consequence inserted in that proposal the price of one dollar and fifty cents per cubic yard, whereas it would have otherwise inserted a price of fifteen dollars. * * * At the time of the public reading of the bids the complainant called the attention of the board to the mistake in the price for the earth excavation, but did not mention the other alleged error."

Judge SHIPMAN says:

"The complainant, it is right to assume, honestly blundered in supposing that the contracts were to be let for the entire work, which was the result at which it was aiming, both in its proposals and in its subsequent proposition. It made three kinds of mistakes. It supposed, or acted as if it supposed, that both proposals must be considered together, and be accepted or be rejected; it made one clerical error in one proposal and also an error through haste in filling out the estimates."

Rarely has a case involving the doctrine of mistake been presented to a Court where there has been less doubt as to the existence of the fundamental fact than the present. Rarely has a case been presented in which there was a more immediate attempt to retrieve the error than the present. It is likewise believed

that rarely has it occurred that a party, whose attention has been called to the existence of the error, has been more persistent in an attempt to take advantage of the mistake, and to derive profit from another's misfortune, than have the defendants in this case.

The language of Mr. Justice NELSON, in *Bradford vs. Union Bank, 13 How., 68*, is most appropriate here:

"We are satisfied, therefore, that the case falls within the established principles of equity, in granting relief against contracts entered into by mistake, and misapprehension of the facts, and where the enforcement of which would enable one of the parties to obtain a most unconscientious advantage over the other."

The scarcity of cases involving similar features to the present is principally due to the fact that this case would never have arisen, but for the provision of Section 172 of the Charter of the City of Rochester (Laws of 1890, Chapter 561, p. 1027), cited in the opinion of Judge WALLACE.

That statute reads as follows:

"*Neither the principal, nor the sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made and the same shall have been duly executed.*"

It is well settled at common law that until the moment of acceptance an offer is revocable.

Schenectady Stove Co. vs. Holbrook, 101 N. Y., 45.
Cook vs. Oxley, 3 Term Rep., 653.

Dickinson vs. Dodds, L. R., 2 Ch. Div. 463.

Judge WALLACE concedes that this provision does not preclude a Court of equity from granting relief in a proper case. It is only because the power of withdrawal did not exist that the petitioner must come into Court to relieve itself against threatened forfeiture and for a rescission or reformation of its bid. This the statute does not prohibit. It does not assume to restrict the powers of a Court of equity. The equitable jurisdiction to relieve a party from the consequences of accident, mistake or fraud, is not taken away.

An effort in that direction would have been unavailing, because violative of the Constitution of the State of New York.

De Hart vs. Hatch, 3 Hun, 375.
People ex rel. Mayor vs. Nichols, 79 N. Y., 590.

The only purpose of the statute was to prevent parties, by their own act, from withdrawing a bid once made and thereby occasioning confusion and injury to the municipality, and facilitating sharp practice and jobbery. But nothing could have been more foreign to the purpose of the Legislature than a prohibition of the Courts, acting judiciously, from nullifying a bid. Otherwise, the petitioner would have been bound by a bid made by Burlingame under duress, or while insane, or under fraudulent inducements given or false representations made by the defendant's representatives, or upon substituted specifications.

Such a position would be violative of every conception of justice and equity.

The cases cited by the respondents do not support the contention that such a statute affects the equity powers of a Court.

In *East River Bridge Co. vs. Donnelly, 93 N. Y., 557*, the Court merely held that an action would not lie in favor of the lowest bidder on public work, against an alderman who voted to award the contract to a higher bidder. The Court assumed that the plaintiff had a right to the contract; but the question of the rescission of the lowest bid was not involved directly or indirectly.

Kimball vs. Hewitt, as Mayor, etc., 17 N. Y. State Rep., 744, was a Special Term decision. Relief was denied to the plaintiff. Much of the opinion consists of *obiter* remarks. But, even if this were not the case, the remarks of the Court merely indicate that public authorities, by permitting the lowest bidder to withdraw his proposal, cannot make the highest bidder the lowest bidder within the meaning of a statute requiring work to be let to the lowest bidder. This might have precluded the respondents from letting the work on Route A to Whitmore, Rauber & Vicinus at a figure $220,000. in excess of the petitioner's bid for that work, but that idea evidently never occurred to them.

The Court in no wise had before it the question of its own power, but merely that of the municipal authorities, who, by their own arbitrary action, without any apparently justifiable reason, sought to permit the withdrawal of a bid.

There are, however, at least four well considered cases in which Courts have declared that no con-

tract was entered into in fact, although all the forms of a contract existed, simply because the minds of the parties had not met.

Thus in *Webster vs. Cecil, 30 Beavan, 62*, where the defendant sent a written offer to sell property and wrote L. 1250 for L. 2250, by a mistake in a hurried addition of items computed on a separate piece of paper. On receiving the plaintiff's acceptance, he discovered the mistake, and at once gave notice of it. The plaintiff had reason to know the real value of the property. Under these circumstances specific performance was refused, on the ground expressed in a subsequent case, that the plaintiff "snapped at an offer which he must have well known to be made by a mistake."

See, also,

Wood vs. Scarth, 2 Kay & John, 33.
Neap vs. Abbott, C. P. Corp., 333.
1 Story Ex. Jur., § 7491.
Pollock on Contracts, § 427, Ch. Mistake.
Latham vs. James, L. R., 13 Eq.
Harris vs. Pepperell, L. R., 5 Eq.,1.
Garrard vs. Frankel, 30 Beav., 445.
Bloomer vs. Spittle, L. R., 13 Eq., 427.

In *Hartford & New Haven Railroad Company vs. Jackson*, 24 Conn., 514, the defendants applied to the plaintiff's agent to transport 50,000 laths from Middletown to Hartford and inquired the expense of transportation. The latter having asked how many bundles that quantity would make, a companion of the defendants, to whom they referred the inquiry, replied 500. The agent under-

stood him to say 100, and he thereupon gave the defendant the price of transporting 100 bundles as the price for the transportation of 500 bundles, which price the defendants agreed to pay.

It was held that the misunderstanding of the agent in regard to the quantity of laths prevented that meeting of the minds of the parties which was essential to a contract between them.

Mr. Justice STORRS said:

"The misunderstanding by the plaintiffs of the offer which was made by the defendants in regard to the quantity of laths which the latter proposed to have transported and which was in form assented to by the former, prevented that meeting of the minds of the parties, that *aggregatio mentium* which was essential in order to constitute a contract between them, and such assent no more bound the plaintiffs than if the offer had been made by the defendants in a language which the plaintiffs did not understand, through an interpreter who had falsely translated its terms."

"In order to such a contract it is necessary that the parties assent to it, and it is well expressed by Mr. Parsons in his Treatise on Contracts that they must assent to the same thing in the same sense. The proposition of one party must be met by an acceptance of the other, each corresponds with each, which cannot be the case when the proposition is misunderstood by the party to whom it is made."

In *Rowland vs. N. Y. & New Haven R. R. Co.*, 61 Conn., 103, the plaintiff asked the defendant's freight cashier at his office at Waterbury what the freight rate was from there to Branford. The cashier, who did not know, and whose duty did not require him to know, asked the way-bill clerk

in the same office, but the clerk, by reason of the noise of a passing train, failed to hear the question correctly, and understood him to ask the rate to Milford, a place not so distant, and gave the rate at 13 cents per hundredweight instead of 2 cents, the correct rate to Branford. The cashier then figured up the amount and stated to the plaintiff that it would be $9.75, which the plaintiff paid and delivered the goods to the railroad company for transportation. The regular rate was $15.75. After the plaintiff left, the clerk discovered his mistake and endeavored to find him, but he had left town, and not knowing how to communicate with him, he sent on the goods to Branford, with instructions to collect the additional six dollars. The mistake was fully explained to the plaintiff there, but he refused to pay, and, the goods being withheld from him, brought an action for their recovery.

It was held that, regarding the clerk as representing the company in the transaction, the minds of the parties, by reason of the mistake made, did not meet upon the question of the freight rate to be charged, and that, therefore, there was no contract.

Mr. Justice TORRANCE said:

"On the assumed state of facts we think the minds of the parties never met on account of this fundamental error or mistake, the result being that the contract attempted to be made was not in fact made. In this view of the matter, the case comes clearly within the principles laid down in Hartford & New Haven Railroad Company vs. Jackson, 24 Conn., 514, and must be governed thereby."

In *Mummenhoff vs. Randall, 19 Ind. App., 44, s. c. 49 N. E. Rep., 40*, the plaintiff quoted to the defendant prices on various vegetables, by a letter dictated to a stenographer. By mistake the stenographer wrote thirty-five cents as the price of potatoes, whereas the plaintiff dictated fifty-five cents as the price. The defendant ordered several car-loads at the price quoted. It was held that the minds of the parties never having met in consequence of the stenographers' mistake there was no contract, since the mistake went to the essence of the agreement.

In *Rupley vs. Daggett*, 74 Ills., 351, it was held that where there is a mutual mistake in regard to the price of an article of property there is no sale and neither party is bound. There has been no meeting of the minds of the contracting parties, hence there can be no sale.

There, the owner of a mare asked $165. for her. The purchaser understood the price asked to be $65. and took her home with him, and refused to pay more than the latter-named sum. The transaction was declared not to constitute a sale.

See, also,

Cundy vs. Lindsay, L. R., 3 Appeal Cases, 465.
McCutter vs. City of New York, 37 N. Y., 324.
Saltus vs. Pruyn, 18 How. Pr., 512.
Kyle vs. Kavanagh, 103 Mass., 356.
Goodrich vs. Lathrop, 94 Cal., 56.

Judge WALLACE seeks to distinguish the case of *Webster vs. Cecil*, (*supra*) by saying:

"The case was one where the vendee knew when he transmitted his acceptance that the proposal did not express the intention of the vendor."

But was it not true here that when the respondents awarded the contract to the petitioner they knew as well as any fact could possibly be known that the proposal which was accepted did not express the petitioner's intention?

The Connecticut cases are dismissed with the suggestion that they are actions at law, where the question was whether a railroad company was entitled to charge its ordinary freight rates for carrying after there had been a preceding negotiation in which the minds of the parties had not met in respect to a different rate.

As a matter of fact, there were not only negotiations, but actual agreements which were acted upon by the party to whom the proposal was made, and who accepted it.

In form, the contract was as complete as though it had been reduced to writing. In fact, it was held that no contract was made, because there was not that *aggregatio mentium* which was a prerequisite of a contract.

These cases are therefore deemed to be directly in point upon the proposition that the existence of a mistake which prevents the meeting of the minds, although unilateral, affords a ground for the cancellation and rescission of the contract which has been apparently perfected.

The respondent sought to criticize these cases by the application of *Dambman vs. Schulting*, 75 N. Y., 55, and similar authorities, but they are based on an entirely different principal. They

were *executed* contracts, *completed* agreements, and not, as here, mere negotiations for a contract. The mistake relied upon was not of a matter *intrinsic* and *essential* to the matter under consideration, but consisted of ignorance of a fact *extrinsic* and *not essential* to the contract, which might or might not have influenced the action of a party to the contract. The ground of complaint was that the co-contracting party did not volunteer to the complaining party all the information he had. Our ground of complaint is that, by a clerical error, the offer made was entirely different from that which was intended.

That respondents have misconstrued these authorities becomes apparent from the following quotation from the opinion of Judge EARL in *Dambman vs. Schulting* (*supra*), p. 63.

"The following illustrations of mistakes as to intrinsic facts essential to contracts against which Courts of equity will relieve are found in the books. A buys an estate of B, to which the latter is supposed to have an unquestionable title. It turns out upon close investigation of the facts that B has no title; in such a case equity will relieve the purchaser and rescind the contract (*Bingham vs. Bingham*, 1 *Vesey*, 126). If a horse should be purchased, which is by both parties believed to be alive, but is at the time in fact dead, the purchaser would, upon the same ground, be released by rescinding the contract (*Allen vs. Hammond*, *11 Peters*, *71*). If a person should execute a release to another party upon the supposition, founded on a mistake, that a certain debt or annuity had been discharged, although both parties were innocent, the release would be set aside (*Hore vs. Becker*, *12 Simons*, *465*). If one should execute a release so broad in its terms as to release

his rights in property, of which he was wholly ignorant, and which was not in contemplation of the parties at the time the bargain for release was made, a Court of equity might either cancel the release or restrain its application as intended (*Cholmondeley vs. Clinton, 2 Meriv., 352; Dungers vs. Asgave, 2 Ves., 304*).

The cases cited by Judge Earl were mostly all cases of unilateral mistake, unaccompanied by fraud, and their number might be indefinitely swelled. It is clear that in the language quoted by the respondents there was no intention to refer to a case like the present.

The respondents likewise cited a passage from *Story's Equity Jurisprudence, § 151.* Through inadvertence, no doubt, they omitted to cite the language immediately preceding their quotation, which is applicable here, since it indicates that unconscionable conduct by one party, though not constituting fraud would lead a Court of equity to relieve against the consequences of the mistake of the other. He says:

"Mistake or ignorance of facts by parties is a proper subject of relief only where it constitutes a material ingredient in the contract of the parties and disappoints their intention by a material error, or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party."

Would it not be a most violent presumption in favor of the respondents who are seeking a forfeiture to say that under the circumstances of this case, in view of Mr. Burlingame's announcement when his bid was read; of the discrepancy between

the bid for earth excavation in trench on Routes A and B, respectively, of the petitioner's written notice to the Executive Board before the acceptance of its proposal, and the prices proposed for the same work by other bidders, that the respondents did not reasonably suppose that the petitioner had made a mistake, and had not expressed its real intention in the proposal? Is it not evident in the language of one of the cases cited that the defendants are now "snapping" at an offer which they fully appreciate was made by mistake? That being so, a Court of equity will be astute in finding grounds to prevent the perpetration of so unconscionable a purpose.

The cases cited by the respondents in no way affect the doctrines announced in the authorities just considered.

In *Reilly vs. Mayor, etc., of New York, 111 N. Y., 473*, the action was one at law to recover for work done and materials furnished under a contract with the city.

There was no pretence of fraud or of mutual mistake; the inadvertence, ignorance and carelessness of the defendants' surveyor related to the preparation of specifications which might have been rejected by the city, as might have also been rejected the bids made by the contractors. No question was raised until after the work had been completed; neither was it attempted to rescind the contract before execution. What the defendants sought to do was to defeat a contract which it had made after it had been fully executed.

The case of *Deeves vs. Richardeon & Boynton*

Co., 39 State Reporter, 173, was also an action at law.

The plaintiff sought to recover damages for non-performance. There was no effort to rescind the contract, and no circumstances indicating the existence of an equity which would have warranted a Court of equity in declaring rescission. Besides, the plaintiff had entered into contract with another in reliance upon the defendant's contract.

The case of *Diman vs. Providence, W. & B. R. R. Co., 5 Rhode Island 130*, was one for the reformation of a subscription, *and not as the appellants erroneously state*, for its rescission. The plaintiff desired to retain part of the benefit of his contract by changing its terms, but did not seek to be relieved from the consequences of his mistake. After the plaintiff had discovered his mistake, he allowed the company to organize and act for several months after such discovery before he notified the company. It was held that he was thus debarred from recovering by his *laches*.

It has been shown by the quotation from the opinion of Chief Justice Ames (*supra*), it is recognized in this, as well as in numerous other cases, some of which have already been cited, that while equity will not reform a written contract unless the mistake is proved to be the mistake of both parties, it may rescind and cancel the contract upon the ground of a mistake of facts material to the contract by one party only.

The case of *Douglas vs. Grant, 12 Ill. App., 274*, was also a case of reformation.

Evidently, the theory upon which this action

has been brought has been misconceived by the respondent, as well as by the Circuit Court of Appeals.

While it is true that the bill of complaint asks for a reformation, as well as rescission, reformation is asked on the theory that the respondent might have been willing to have permitted the correction of the errors of which complaint was made, and to have then allowed the petitioner to perform the contract thus corrected. In the event of an unwillingness on the part of the respondent to permit the petitioner to perform, then a rescission of the bid was demanded. We are willing to concede that no case for a reformation of the contract has been made out.

Almost every case cited in support of the opinion of Judge Wallace was one in which the reformation of a contract was sought, and where relief was withheld either because the mistake alleged was not mutual or because it was not shown that there was a mistake on one side and fraud on the other.

For a rescission, it suffices to establish a mistake as to a material element, on the part of one only of two contracting parties.

The respondents likewise claim that the petitioner's bid was an unbalanced one, and was not unprofitable.

For the respondents to assert that the petitioner could have profitably performed work for $857,552. 50, for which a contract was let to Whitmore, Rauber & Vicinus for $1,123,920.00, under the advice of their engineers, who, before any invitation for bids was extended, had made a careful

estimate of cost for the guidance of the Executive Board, is such a complete stultification as to invite a suspicion of bad faith.

To denominate the petitioner's bid an unbalanced one, is to impute to it the purpose of gaining an advantage by bidding low on some items, and high on others, for the object stated by Mr. Fteley. (Record, p. 314.)

> "Q. And what is the purpose, of submitting bids of that kind?
>
> "A. It may be due to various reasons; it may be due to the fact that the contractors do not like to disclose to their fellow-bidders the prices at which they can do the work, owing possibly to some peculiar advantages which they may have. Another very strong reason for it is that sometimes a contractor has not very much capital and he likes to charge a very much higher price for a portion of the work which is to be done first, so that he can secure a margin of capital with which to do the balance of the work."

None of these reasons can possibly have operated in the present case.

The items in which the errors occurred were of such a character that any person familiar with construction work had the same advantages as were possessed by the petitioner for doing that particular portion of the work. Moveover, while it is true that the earth excavation and tunnelling had to be done before the laying of the pipe could begin, the prices charged for earth excavation and tunnelling, instead of being higher than the prices ordinarily charged for such work, were so much *lower* than the prices charged

by other contractors, and the actual cost of doing the work, as to demonstrate the non-existence of any motive for interposing an unbalanced bid.

Not only was the petitioner's bid lower than that of the other bidders on the two items as to which mistakes were made, but as to every other important item its bid was substantially below that of the other bidders.

Fteley, in support of his suggestions that this was an unbalanced bid, refers to the following particulars:

(*a*) Item "x" of Route A. This relates to 100 feet of cast iron pipe, for which he claims a charge of 50 per cent. above the market price is made.

A reference to the summary of the proposals (*Rec., p. 277*) shows that the price charged by the complainants was 10 cents per foot in excess of that of two of the contractors and $1. per foot less than that charged by the third. The aggregate of the bid amounted to $300. only.

(*b*) He next refers to item "gg" of Route B, which also relates to cast-iron pipe.

The quantity of this pipe was only 200 feet, and the proposed charge by the complainants was exactly the same as the charge of two of the other contractors and 80 cents less than the charge of the third. The aggregate of this bid was $240. only.

(*c*) The next item referred to in substantiation of this claim is "r" of Route B.

This relates to 400 cubic yards of masonry, the

aggregate of which amonnts to $3,200., which is $400. less than that charged by one of the contractors and $800. less than that charged by the two others.

(*d*) The other items referred to are of the same general character; the quantities are small and the items unimportant, and the total difference between charges at what Mr. Fteley considers the market values and the prices proposed amounts to a few thousand dollars only.

It is difficult to understand how, in a contract which involves nearly a million dollars, this circumstance can stamp the bid as an unbalanced one as against the testimony of Mr. Burlingame and the concession that he intended to charge 70 cents for earth excavation in trench per yard and $15. per cubic yard for tunnelling.

Mr. Burlingame in the most impressive manner declared that it was not his purpose to make an unbalanced bid; that there was no possible object in making such a bid in this case; that he had no instructions from the complainant to make such a bid, and that, in making his calculations and doing whatever he did, he acted in good faith, making every effort to be as careful as he could.

Rec., pp. 55, 58, 59.

Mr. Kuichling, the respondents' engineer, in charge of the work, does not pretend that this was an unbalanced bid, although he had the fullest knowledge of all the details, of the specifications and of the work.

It is further manifest that the petitioner was so unfamiliar with the topography of the country

in which the work was to be done, that knowledge superior to that possessed by the respondents' experienced engineers cannot be attributed to it. Without possessing such knowledge, it would have been the height of absurdity for the petitioner to have contemplated the present item of an unbalanced bid.

Neither the Circuit Court nor the Circuit Court of Appeals have lent any credence to the theory that the petitioner's bid was an unbalanced one. On the contrary, the existence of a mistake, the commission of an egregious blunder on the part of the petitioner, has been conceded, not only by the Courts below, but by the respondents themselves.

This was not a case of an unbalanced bid, but of an unbalanced mind.

Stress has been laid on the circumstance that before any action was taken by the respondents, the petitioner sent a communication to the board insisting that its bid for the whole work included in contracts number 1 and 2 was a single proposal, protesting against letting the two contracts to different contractors, and stating that clerical errors had been made in the proposals for Contract No. 2, Route B, in the prices for earth excavation and tunnel excavation, and the details of the errors.

This communication is consistent with the facts as developed by the testimony. In it, Mr. Moffett says:

> "We further desire to call your attention to the fact, *which you will likewise recollect*, that immediately upon the opening of the bid our engineer, Mr. Burlingame, who entered the prices bid for the work in the schedule

submitted, called your attention to the discovery that he had made two clerical errors in copying his figures, while entering them in the statement of prices for work on line B of the steel-pipe conduit, both in respect to the earth excavation and the tunnelling. Reference to the prices proposed for the same character of work on line A demonstrates that the error committed was purely clerical. The manifest insufficiency of the prices inserted for these two classes of work on line B, as is shown by the bids of our competitors, and the fairness of the prices charged for the same work on line A, which are substantially the same as those specified by our competitors, also establish the fact that the error was a clerical one. A mere glance at the figures shows that the price for tunnelling must have been intended to be $15. per foot and not $1.50 per foot, and for earth excavations in the trench 70 cents per yard and not 50 cents per yard.

"Allowing us for these items of work on line B the prices which we charge therefor on line A, our bid for the steel-conduit line is still far below that of any of our competitors. The law regulating your official action warrants you in taking into consideration these facts, and in permitting us to correct these manifest errors, particularly since they have not misled any other bidder, and since the city which you represent, will not be thereby deprived of any legal or moral right or the benefit of honest competition. We apprehend that neither you, nor the community which you represent, desire to take advantage of a technicality or of a clerical error, or to profit by blunders of so undoubted a character as those indicated, and we are convinced that every fair-minded citizen will be swift to rec-

ognize the broad equity and the apparent justice of our position. Of course if under the circumstances you shall persist, not only in ignoring the fact that our proposal upon the whole work was intended as an indivisible one, and at the same time in withholding from us the relief to which we claim to be entitled, with respect to the correction of the clerical error of our engineer we shall feel compelled to seek such redress as we are advised by our counsel. it is within the power of the Court to grant us. We should greatly deplore the necessity which would force us to resort to such measures, for we appreciate the importance to your city of a speedy increase of its water supply, and the fact that the course suggested by us would involve great and unavoidable delay in attaining that desired end; yet, convinced of the justice of our position, a sense of duty to ourselves requires us to seek self-protection by all legitimate methods."

"We therefore respectfully request *either* that the contract in its entirety for both sections of the work be awarded to us, at the corrected prices, *or* that we may be allowed to withdraw our proposal."

Judge SHIPMAN admits that the petitioner honestly blundered in supposing that the contracts were to be let for the entire work.

The evidence indicates that this belief was entertained. The fact that the bids for both contracts were presented in a single package under one cover, that the defendants at first declined to entertain the bids on account of their irregularity, and that the two pieces of work were interdependent, shows that the petitioner acted in good faith.

The mere request that the contract in its entirety

for both sections of the work should be awarded at the correct prices does not deprive the petitioner of its standing in Court, or justify a Court in overlooking its request that it might be allowed to withdraw its proposal, or justify the defendants in awarding a contract not for Route A, where no errors existed, but for Route B, where the existence of such errors was demonstrated.

It is no answer for the defendants, when called upon to act fairly, and to relieve the petitioner from the consequences of an unfortunate mistake, to say that the petitioner asked for greater relief than that to which it was entitled.

If an excessive prayer for relief justifies the withholding of every remedy, then there are but few cases in which a Court of Chancery will ever be able to grant relief.

The defendants proceeded on the theory that public policy forbids the Court from rescinding a bid on public work. In fact, in the Circuit Court, they admitted that a different rule exists as to competitive proposals on public work from that which applies in the case of private individuals, and that there is something so sacred about a public contract that the Courts must keep aloof from it.

This is but another way of saying that the principles of honest and fair dealing which the State applies to its subjects are not applicable to the State itself; that while individuals may not speculate on the mistakes of their neighbors, or take an unconscionable advantage of accident or error, the sovereign, and those in whom governmental functions are lodged, while acting in the

private capacity of a contractor, may, nay, must, insist upon confiscation and forfeiture, and treat even a conceded mistake as irremediable.

When has public as well as private honesty ceased to be the true public policy? Why should a municipality when it becomes a contracting party, be governed by any different rules than the party with whom it contracts? The distinction which the defendants seek to make is entirely fanciful, unreasonable and unsound.

It is conceded that in order to justify a Court in interfering in the case of a public contract, as in every other case, the evidence of the existence of the mistake must be clear and conclusive, and that the Court must carefully scrutinize the testimony in order to protect itself from imposition.

But here, there is no room for doubt as to the existence of the mistake, for it is conceded on every side that precisely the very mistake which is claimed to have been made was made honestly and unintentionally.

And yet the United States Circuit Court of Appeals had held that a Court of Chancery is powerless under such circumstances, and is bound to enforce a forfeiture resulting from the occurrence of a mistake of so serious a character as that which is conceded to have been made in this case.

II.

The Circuit Court of Appeals overlooked the grave and important question presented by the fact that, notwithstanding the temporary injunction granted in this action, and before the petitioner was or could be defaulted, the respondents entered into a contract with Whitmore, Rauber & Vicinus for the construction of the conduit line which was the subject of the petitioner's proposal, and that such construction has been completed, thus making performance by the petitioner impossible.

Thus far the petitioner has not been in default with respect to the execution of the contract, as required by the respondents' resolution. Before the time for such execution arrived the respondents were stayed by injunction from declaring a forfeiture. Almost contemporaneously with the service of such injunction a contract was entered into with other contractors, which has been performed, for doing the very work on which the petitioner made its bid.

The respondents are not now in a position to enable the petitioner to perform its contract, if it should now be ready and willing to enter into such a contract. By the respondents' acts, therefore, performance by the petitioner of their requirements has been rendered impossible, and they should be enjoined from seeking to impose a forfeiture on the

petitioner, and to enforce a penal bond under such circumstances as those here disclosed.

United States vs. Peck, 102 U. S., 64.
Shaw vs. Republic Life Ins. Co., 69 N. Y., 285, 293.
Mansfield vs. N. Y. C. & H. R. R. Co., 102 N. Y., 211.
Bogardus vs. New York Life Ins. Co., 101 N. Y., 328.
Taylor vs. Risley, 28 Hun, 144.

U.S. vs. Peck (*supra*) bears strong resemblance to this phase of the case under consideration. There Peck contracted with a military officer to deliver a quantity of hay to the military station at Tongue River in the Yellowstone region. It was contemplated that the hay was to be cut at the Big Meadows, near the mouth of the river. The Government officers, fearing that Peck would not carry out his contract, and it being absolutely necessary to obtain the hay, allowed other parties to cut the hay at Big Meadows, and therewith to supply the station at an increased expense. It was held that the act of the Government officers excused Peck's non-performance, on the authority of *Fleming vs. Gilbert, 3 Johns., 528*, and the principle just stated.

In the case just cited from *Johnson*, Mr. Justice Thompson said:

"It is a sound principle, that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned. Had not the plaintiff dispensed with a further compliance with the condition of the bond, it is probable that the defendant would have taken measures to ascertain

what steps were requisite to get the mortgage discharged of record, and would have literally complied with the condition of the bond."

If the temporary injunction had been dissolved and the petitioner had expressed a willingness to enter into a contract with the respondents, the latter could not have made such a contract after January 20, 1893, when it accepted the proposal of Whitmore, Rauber & Vicinus; and they certainly could not have done so, after the contract had been performed by Whitmore, Rauber & Vicinus, and the conduit which the respondents were authorized to construct, had been completed.

To withhold relief under these circumstances, and to place the respondents in a position to insist upon the enforcement of the penal liability on the bond, would not only be unjust and inequitable, but would smack of confiscation.

2 Beach Modern Equity Jurisprudence, §1013.

III.

The assertion that the petitioner's error was due to Burlingame's negligence, even if true, would not debar it from relief under the circumstances disclosed by the record.

While it is true that Mr. Burlingame, in a moment of self-humiliation and contrition, declares there was gross carelessness on his part, yet, viewing all of his testimony, it is evident that, in the preparation of his bids, he acted in good faith, was

as careful as he could possibly be, but, owing to the unexpected and unwonted responsibility which had been placed upon him, the hurry and excitement incident to the examination of all the numerous details, the many interviews upon the varied subjects with which he was engaged, his nervousness and near-sightedness, the haste in which he was required to insert his prices into the blanks, the late arrival of Mr. Moffett, he was unable to check his work and to discover the errors which he had made through inadvertence.

The straits to which the respondents are reduced are apparent from their argument that Mr. Moffet's detention by business in Boston was the cause of the non-discovery of the clerical error, and constituted negligence.

Considering Burlingame's long years of experience, his high character and unquestioned ability, the petitioner was justified in detailing him for the preparation of the bids, in the absence of Mr. Hodgkins, and a charge of negligence, either against it or Mr. Burlingame, is unwarranted.

But even assuming that Mr. Burlingame was negligent, both in that he made the initial error and because he did not discover it before presenting the bids (although he attempted to remedy it immediately upon discovery), it is insisted that such negligence does not afford an answer to the petitioner's demand for equitable intervention. If it were, there is scarcely a case in which relief has been granted, either by reformation or rescission of contracts entered into by mistake, in which it might not have been asserted that the party making the mistake was guilty of negligence in not dis-

covering the mistake from which he desired to be relieved.

This idea is well illustrated in the case of *Albany State Savings Institution vs. Burdick*, 87 N. Y., 40, where Judge EARL said, considering a similar objection interposed to the claim made by the grantee whose deed provided for the assumption of a prior mortgage, which deed he failed to examine and did not discover the mistake:

"Indeed, in most of the cases to be found in the books where relief has been sought against written instruments on the ground of fraud and mistake, the complaining parties were chargeable with the same kind of negligence which exists in this case—to wit, the omission to read or understand the contents of instruments executed or accepted. It has certainly never been announced as the law in this State that the mere omission to read or know the contents of a written instrument should debar any relief by way of reformation of the instrument on account of mistake or fraud. It is the general rule that where a written instrument failed to conform to the agreement between the parties in consequence of the mutual mistake of the parties, however induced, or the mistake of one party and fraud of the other, a Court will reform the instrument so as to make it conform to the actual agreement between the parties.

"In the case of *Wells vs. Yates* (44 N. Y., 525), so far as can be perceived from the facts stated, there was the same room for charging the plaintiff with negligence in not understanding the contents of the deed executed by him as there is for charging Mrs. Burdick with negligence in this case, and yet the deed was reformed.

"In the case of *Botford vs. McLean* (45 Barb., 478), the facts were as follows: Upon a sale of personal property the purchasers agreed to pay there-

for the sum of $6,000., viz.: $2,000. in cash, and the balance in four equal annual payments, with interest, for which they were to execute their four several promissory notes for one thousand dollars each, with interest, payable in one, two, three and four years, and to secure the payment thereof by a chattel mortgage upon the property. $2,000. was paid down, and the chattel mortgage was executed, conditioned for the payment of the notes, with interest. Four several promissory notes were also executed by the purchasers for $1,000. each, payable at the time as agreed, but two of them were so drawn as not to bear interest. The vendor, seeing that two of the notes were on interest, assumed that the other two were also on interest, and accepted the same, believing that all were properly drawn. The purchasers, knowing that two of the notes were so drawn as not to bear interest, purposely abstained from calling the vendor's attention to the fact. It was held that there was a mistake on one side and fraud upon the other, and that the two notes should be reformed so as to conform to the actual agreement between the parties, and the decision was affirmed in this Court in 1870. In that case there was a certain degree of negligence in not reading the two notes. It is said by the learned counsel for the plaintiff, in the argument before us, that there was artifice used in that case to induce the plaintiff to believe that the two notes were drawn, with interest, that artifice being in drawing, and placing before the plaintiff the first two notes payable with interest, by which the payee was thrown off his guard; but that circumstance was not the basis of that decision, and does not distinguish that case from this. There was nothing there to prevent the payee from reading the notes, and he had abundant opportunity to do so. If he had read them the mistake and fraud would have been discovered. * * *

"In the case of *Andrews vs. Gillespie* (47 N. Y.,

487), the attorney who drew the mortgage made it payable in five years instead of ten, as agreed between the parties, and it was held that the mortgagor could have it reformed. There the mortgagor could have discovered the mistake by simply reading the mortgage. No artifice was used to prevent him from reading it. He executed it believing that the attorney had drawn it correctly, just as Mrs. Burdick in this case accepted the deed believing it had been drawn correctly, and the fault or negligence was just as great in the one case as in the other."

In *Keister vs. Meyers*, 115 Ind., 312, it was held that the mere fact that a mortgagee accepts a mortgage with an incomplete description of land does not bar him from relief in equity because of negligence.

To the same effect is *Palmer vs. Hartford Ins. Co*, *54 Conn., 488.*

Although negligence has, in some cases, been held to be of such a character as to debar a remedy, it is believed that in every such case the negligence which was held sufficient to warrant the withholding of relief was that of the party who demanded it and not that of a third person, whatever his relation may have been to the complainant.

This thought is well illustrated by the numerous cases where mistakes in written instruments have been corrected in equity, although such mistakes were occasioned by the ignorance, mistake or neglligence of the draughtsman.

Drury vs. Hayen, 111 U. S., 223.
Elliott vs. Sackett, 108 U. S., 132.
Crippen vs. Baumes, 15 Hun, 136.
Wheeler vs. Kirkland, 23 N. J. Eq., 13.
Canedy vs. Marcy, 13 Gray, 373.

It does not matter whether the draughtsman who was guilty of negligence was the agent of the party seeking the correction or of the other party.

Menominee, &c., Co. vs. Langworthy, 18 Wisc., 444.

A mistake made by a clerk in computing the amount due on a promissory note may be corrected in a Court of Chancery.

Bartell vs. Roderick, 34 Iowa, 517.

In *2 Pomeroy's Equity Jurisprudence, Section 856*, the author makes this conservative statement:

> "As a second requisite, it has sometimes been said in very general terms that a mistake resulting from the complaining party's own negligence will never be relieved. This proposition is not sustained by the authorities. It would be more accurate to say that where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of legal duty, a Court of equity will not interpose its relief; but even with this more guarded mode of statement, each instance of negligence must depend to a great extent upon its own circumstances. It is not every negligence that will stay the hand of the Court. The conclusion from the best authorities seems to me, that the neglect must amount to the violation of a positive legal duty. The highest possible care is not demanded. Even a clearly established negligence may not of itself be a sufficient ground for refusing relief, if it appears that the other party has not been prejudiced thereby."

The case of *Grymes v. Sanders, 93 U. S., 65*, is relied upon by the respondents to support their contention. An examination of the case will, however, show that it bears no resemblance to the present. The subject matter of the contract was mining property. The alleged mistake was of such a character as to indicate that it had no effect upon the mind of the party subsequently claiming its existence for a long period after its discovery, and then it seemed to have been a pretext rather than a cause. Full knowledge of all the facts was accessible to both parties from the beginning of the negotiation until the transaction was closed. The complainants acted advisedly in not availing themselves of the opportunity of acquiring absolute knowledge. Moreover, upon discovery of the facts, the complainant for a long time remained silent, and continued to treat the property as his own. The property was of a speculative character, subject to large and constant fluctuations in value. When the complaint was finally made, it was impossible to place the parties in *statu quo*. The parties, in their dealings, stood upon a footing of equality. Under these circumstances, an action for rescission, brought two years after the contract was made, was held not maintainable.

There is nothing in the case which indicates it to be the purpose of this Court to lay down such a rule as is here contended for by the respondents.

In *Webster vs. Cecil*, and in the cases in *24* and *61 Conn.*, it might with equal justice have been urged that there was negligence which would pre-

clude relief. Yet, there was no withholding of relief.

The cases are numerous in which recoveries for money paid under a mistake of fact have been allowed in actions at law, notwithstanding the existence of circumstances indicating carelessness on the part of the complainant, occasioning the mistake. If relief is granted at law, it should *á fortiori* be afforded in a Court of equity.

In *Onondaga County Savings Bank vs. United States, 64 Fed. Rep., 704*, the Court said:

"Negligence of the plaintiff in making the mistake does not give the defendant the right to retain what is not his, unless such negligence has so misled and prejudiced him that it would be inequitable to re quire him to refund."

So in *Mayer vs. Mayor, etc., of New York, 63 N. Y., 455*, it was declared that money paid under a mistake of a material fact may be recovered back, *although there was negligence* on the part of the person making the payment unless the position of the party receiving it has been changed in consequence thereof and it would be inequitable to allow a recovery.

See also *Kelly vs. Solari, 9 Meeson & Welsby, 54.*
Townsend vs. Crowdy, 8 C. B. N. S., 477.
Bell vs. Gardner, 4 Mann. & Gr., 11.

Here, if there was negligence in the true sense of the word, it was of the most innocent character. There was an immediate attempt to retrieve the error. The respondents suffered no injury in conse-

quence thereof. They did not alter their position to the slightest extent. They lost nothing which they had. They were deprived of nothing to which they were entitled. They suffered no inconvenience. The petitioner was ready to enter into a contract at a price which even with the errors corrected would have been far more favorable to the defendants than the contract which they eventually made and permitted to be performed.

To enable the respondents, therefore, to take advantage of Burlingame's negligence, if such it may be termed, and to enforce the penal liability embodied in the petitioner's bond, would permit them to profit from a negligent act which has in nowise been a source of damage to them has been but of incalculable injury to the petitioner.

IV.

The petitioner did not have an adequate remedy at law, and had the right to resort to equity for relief.

The rescission of contracts on the ground of mistake is one of the well established heads of equity jurisprudence.

Cases in which such relief has been granted are numerous.

> *Hazard vs. Griswold*, 141 U. S., 260, is a recent illustration of great value.

What the petitioner desired was to prevent the forfeiture and enforcement of its bond and to procure a cancellation of its proposal, because, under

the circumstances, it would have been unjust, harsh and inequitable to have enforced such forfeiture.

If the petitioner had not resorted to equity and had failed to enter into a contract with the City of Rochester at the time designated in the latter's notice, there would have been a violation by it of the terms of its bond which would have given rise to an action for its enforcement. In an action at law thus instituted, the facts disclosed by the record would not have constituted a defense. A court of law would have been bound to enforce the contract according to its terms, and the petitioner would have been held to the latter of its contract.

It is from the very fact that a court of law is powerless to grant relief against accidents and mistakes that courts of chancery have taken to themselves the consideration of causes in which relief is required against the legal effect of contracts, or situations resulting from accidents and mistakes.

The respondents are unable to point to a single case in which a court of law has assumed to permit a defense to a bond to be interposed based upon allegations such as are made in this case.

As instances of the necessity of resorting to equity where relief could not have been obtained in an action at law, attention is called to the following cases:

Clute vs. Konies, 102 N. Y., 377.
Martin vs. Melville, 11 N. J. Eq., 222.
Rowley vs. Empire Insurance Company, 36 N. Y., 550.
Hay vs. Star Fire Ins. Co., 77 N. Y., 235.
Fink vs. Queen Ins. Co., 24 Fed Rep., 318.
Muldrow vs. Norris, 2 Cal., 74.

The respondents, however, claim, that under the New York Code of Civil Procedure equitable defenses may be interposed to an action at law, and relief by way of reformation or rescission may be granted in such an action, and *Pitcher vs. Hennessey, 48 N. Y., 415*, and *Born vs. Schrenkeisen, 110 N. Y., 55*, are cited to sustain the position.

But these authorities strongly fortify the petitioner's position. In the first the contract sued upon did not express the actual agreement of the parties. The defendant pleaded the mistake and prayed for a reformation of the contract by way of counterclaim, and under the mixed system authorized by the Code of mingling legal and equitable defenses, the defendant was held entitled to relief.

In the second case it was expressly held that where, in an action at law upon a written contract the defendant claims a mistake and seeks to have the contract reformed because thereof, he should allege the facts entitling him to the reformation *by way of counterclaim, and should pray judgment for such reformation.*

Such is the rule laid down in *Pomeroy on Remedies and Remedial Rights, §95; Bank vs. Tucker, 42 Cal., 346;* and was the practice pursued in *Andrews vs. Gillespie, 47 N. Y., 487.*

The same rule necessarily applies where instead of a reformation of the contract, rescission and an injunction are demanded.

> *Hartford Fire Ins. Co. vs. Bonner Mercantile Co., 44 Fed. Rep., 155, 156.*

The very fact that the defense is required to be pleaded, by way of counterclaim, indicates that it

constitutes ground for affirmative relief and may be made the subject matter of an independent cause of action. The same considerations which recognize the right to equitable relief, when asserted as a defense, must necessarily uphold the right of a court of equity to afford the same relief, whenever resort is taken to it.

A party who is sought to be held under a contract or instrument, which does not embody his intention, and against which he is entitled to relief, is not bound to await the convenience of his adversary who may at some indefinite time seek to enforce it in a court of law, but may anticipate the impending attack by seeking prompt redress in chancery.

Whatever may be the rule in the State Court, it is well settled that equitable defenses will not be permitted to be pleaded in an action at law brought in the Federal Courts. There the distinction between law and equity has never been abolished, and there can be no mingling of legal and equitable remedies or causes of action.

Bennett vs. Butterworth, 11 How., 669.
Foster vs. Mora, 98 U. S., 425.
Northern Pacific Railroad Co. vs. Paine, 119 U. S., 561.
Johnson vs. Christian, 128 U. S., 374.
Montejo vs. Owen, 14 Blatchf., 324.
Buller vs. Sidell, 43 Fed. Rep., 116.
Hartford Fire Ins. Co. vs. Bonner Mercantile Co., supra.

This rule has been applied to actions brought in State Courts in which equitable defenses were

properly interposed, but which were subsequently removed into the Federal Court.

Northern Pacific R. R. Co. vs. Payne, supra.

Mr. Justice FIELD said:

"In the Courts of the United States to legal actions legal defenses only can be interposed. *If the defendant have equitable grounds for relief against the plaintiff he must enforce them by a separate suit in equity.* If his equitable grounds are deemed sufficient he may stay the further prosecution of the action at law or be furnished with matter which may be set up as a legal defense. Upon the removal, therefore, of the action to the Circuit Court the equitable defense could not be considered."

In this case the Federal Court has jurisdiction of the parties and the subject matter, and such jurisdiction cannot be limited, restrained or affected by any State legislation, by virtue of which the respondents assert the existence of an adequate remedy at law.

Payne vs. Hook, 7 Wall., 425.

V.

It is respectfully submitted that the decree of the United States Circuit Court of Appeals for the Second Circuit should be reversed, and this cause remanded to it, with instructions to affirm the decree of the Circuit Court with costs.

LOUIS MARSHALL,
Petitioner's Counsel.